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ABSTRACT

This legal compendium focuses on the difficult and volatile issues of student discipline in cases of both academic and nonacademic misconduct. Part I lists non-academic codes from University of Michigan, Yale College, Vanderbilt University, University of Iowa, City University of New York, Baylor University, Columbia University, George Washington University, University of Wisconsin, Cornell University, University of Houston, and Princeton University. In Part II academic codes from University of Wisconsin, College of New Rochelle, Michigan State University, Massachusetts Institute of Technology, and Fairleigh Dickinson University are listed. Part III contains annotations of seven key legal decisions. Part IV reproduces articles from law review and legal periodicals including: (1) "University Disciplinary Process: What's Fair, What's Due and What You Don't Get" (James M. Picozzi); (2) "Due Process Rights in Student Disciplinary Matters" (Lisa L. Swen); (3) "Hate Speech in Colleges and Universities-The Aftermath of RAV. v. City of St. Paul, Minnesota" (Valerie L. Brown); (4) "Students' Rights to Counsel in University Disciplinary Proceedings" (Douglas R. Richmond); (5) "Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing of First-Amendment and University Interests" (Patricia B. Hodulik); (6) "Stopping Students from Cheating: Halting the Activities of Term-Paper Mills and Enforcing Disciplinary Sanctions Against Students Who Purchase Term papers" (Kathleen M. Capano); (7) "Student Challenges to Grades and Academic Dismissals: Are They Losing Battles?" (Dina Lallo); and (8) "How Do We Manage the Right to Hate?" (Abner J. Mikva). Section V offers selected National Association of College and University Attorneys conference outlines. A listing of additional resources is included. (JB)

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THE PUBLICATION SERIES

Student Disciplinary Issues: A Legal Compendium

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Student Disciplinary Issues:

A Legal Compendium

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and

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National Association of College
and University Attorneys

1993

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Users of this publication should be reminded that the information given here is general in nature and is not intended as legal advice. Legal counsel should be consulted concerning the legal effects and ramifications of specific actions, questions, and situations.

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EDITORS' NOTE

The commitment by NACUA to build a viable publications series which provides a service to its members, as well as the rest of the higher education community, continues with the publication of Student Disciplinary Issues: A Legal Compendium.

The compendium focuses on the difficult and often volatile issues of student discipline in both academic and nonacademic conduct. College and university counsels, administrators, and officers throughout the nation confront these issues on a daily basis. Constitutional issues of due process, vagueness, privacy, and notice and opportunity to be heard necessitate college officials' awareness and understanding of these issues. The compendium provides the framework for assisting college officials in planning for and addressing student discipline issues. It includes an extensive listing of selected student codes of conduct -- academic and nonacademic -- as well as key law review articles, NACUA outlines and a sampling of annotated legal decisions. A listing of additional resources is included to assist readers in conducting further research into this important area.

It is our hope that the compendium serves as useful guidance to college officials and encourages institutions to plan in advance of the need for discipline to review and perhaps revised their student disciplinary codes.

On behalf of NACUA, we wish to acknowledge the following persons and organizations for their assistance: Shelley Sanders Kehl, Esq. and the members of the New York/New Jersey NACUA Luncheon Group for their support and guidance; staff at NACUA, including Linda Henderson, Marcus Mills and Jeremy F. Perlin; Barbara Dopp at the New Jersey Bar Association; Marsha Linn and Nina South at Princeton; and the services of the ERIC Clearinghouse on Higher Education.

As always, we are eager to receive your comments on this compendium.

Valerie L. Brown, Esq.
Katherine Buttolph, Esq.
Editors
July 1993

TABLE OF CONTENTS

EDITORS' NOTE iii

I. SELECTED CODES OF STUDENT CONDUCT AND DISCIPLINE PROCEDURES -- NON-ACADEMIC

1. "Harnessing the 'Spirit of Insubordination': A Model Student Disciplinary Code," by Edward N. Stoner II and Kathy L. Cerminara. The Journal of College and University Law, Vol. 17, No. 2, 1990 3

2. University of Michigan -- "Statement of Student Rights and Responsibilities" 37

3. Yale College -- "General Conduct and Discipline" 43

4. Vanderbilt University -- Chapter 7, "Judicial System," Policies and Procedures in Non-Academic Matters 49

5. University of Iowa -- "Student Responsibilities" 55

6. City University of New York -- "Student Disciplinary Procedure Bylaws, as Amended by the Board of Trustees on February 24, 1992" 65

7. City University of New York -- "Rules and Regulations for the Maintenance of Public Order Pursuant to Article 129-1 of the Education Law" 73

8. Baylor University -- "Student Disciplinary Policy" 79

9. Columbia University -- "Rules of University Conduct: Chapter XLI of the Statutes of the University" 93

10. Columbia University -- "Model Dean's Discipline Procedure" 101

11. George Washington University -- "Guide to Student Rights and Responsibilities" 105

12. University of Wisconsin -- "Procedures Governing Academic and Non-Academic Misconduct and General Policies Governing Student Life" 117

13. Cornell University -- "Campus Code of Conduct -- Judicial Structure and Procedure" 131

14. University of Houston -- "Student Life Policies" 155

15. Princeton University -- "Rights, Rules, Responsibilities" 163

II. SELECTED CODES AND POLICIES -- ACADEMIC

1. University of Wisconsin -- "Academic Misconduct Rules and Procedures" 181

2. College of New Rochelle -- "Academic Code of Conduct: School of Arts and Sciences" 185

3. Michigan State University -- Article 1: "Student Rights and Responsibilities" and Article 2: "Academic Rights and Responsibilities 197

4. Massachusetts Institute of Technology -- "Policies and Procedures: Academic Honesty" 201

5. Fairleigh Dickinson University -- "Academic Integrity Policy" and "University Regulations" 205

III. SELECTED LEGAL DECISIONS

1. Introduction 213

2. Keith E. Gardenshire v. E.L. Chalmers, 326 F. Supp. 1200 215

3. Jefferson David Edwards v. The Board of Regents of Northwest Missouri State University, et. al., 397 F. Supp. 822 216

4. Kathleen Kelleher v. Flawn, et. al., 761 F. 2nd 1079 217

5. Charles C. Smyth and Greg Smith v. Arend Lubber, 398 F. Supp. 777 218

6. James J. Morale v. Michael Grigel, et. al., 422 F. Supp. 988 219

7. State of Utah v. Gregory T. Hunter, 831 Pacific Reporter 1033 220

IV. SELECTED LAW REVIEW AND LEGAL PERIODICALS

1. "University Disciplinary Process: What's Fair, What's Due and What You Don't Get," by James M. Picozzi. *Yale Law Journal*, Vol. 96, No.8, 1987. 223

2. "Due Process Rights in Student Disciplinary Matters," by Lisa L. Swen. *The Journal of College and University Law*, Vol. 14, No. 2, 1987. 253

3. "Hate Speech in Colleges and Universities -- The Aftermath of *RAV. v. City of St. Paul, Minnesota*," by Valerie L. Brown. *West Education Law Reporter*, Vol. 79, No. 3, March 11, 1993. 277

4. "Students' Rights to Counsel in University Disciplinary Proceedings," by Douglas R. Richmond. *The Journal of College and University Law*, Vol. 15, No. 3, 1989 289

5. "Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing of First- Amendment and University Interests," by Patricia B. Hodulik. *The Journal of College and University Law*, Vol. 16, No. 4, 1990 313

6. "Stopping Students from Cheating: Halting the Activities of Term-Paper Mills and Enforcing Disciplinary Sanctions Against Students Who Purchase Term Papers," by Kathleen M. Capano. *The Journal of College and University Law*, Vol 18, No. 2, 1991 (Student Note) 329

7. "Student Challenges to Grades and Academic Dismissals: Are They Losing Battles?," by Dina Lallo. *The Journal of College of University Law*, Vol. 18, No. 4, 1992. 351

8. "How Do We Manage to Right to Hate?," Commentary by Judge Abner J. Mikva. The Journal of College and University Law, Vol 19, No. 1, 1992. 369

V. SELECTED NACUA CONFERENCE OUTLINES

1. "Disciplining the Student," by John G. Hill, Jr. XXVI-88-72. October 28, 1988. 375

2. "Disciplining the Student in Public Higher Education," by Shawn Newman. XXVI-88-73. October 28, 1988. 379

3. "Difficult and Troubled Students," by Jeffrey H. Orleans. XXVI-89-74. March 3, 1989 397

4. "Bad Acts Off Campus: The Limits of Institutional Authority," by Paul K. Sutherland. XXVI-88-62. 1988 NACUA Annual Conference. 409

5. "Private Lives in Public Places: Control and Regulations of Student Behavior," by Lee B. Liggett. XXVI-89-76. 1989 NACUA Annual Conference 417

6. "Private Lives in Public Places: Control and Regulations of Student Behavior," by Keith M. Miser. XXVI-89-64. 1989 NACUA Annual Conference. 427

7. "Dealing with Students: Discipline Problems," by Edward N. Stoner II. XXVI-90-97. October 5-6, 1988. 433

8. "Regulations of Student Conduct: Bad Acts On/Off Campus," by Victor J. Hahn. XXVI-91-113. January 20, 1991. 461

9. "Disciplining the Student," by David R. Scott. October 3, 1992. 475

VI. ADDITIONAL RESOURCES 491

I. SELECTED CODES OF STUDENT CONDUCT AND DISCIPLINE PROCEDURES -- NON-ACADEMIC

Harnessing the "Spirit of Insubordination": A Model Student Disciplinary Code*

Edward N. Stoner II**
and Kathy L. Cerminara***

> The article of discipline is the most difficult in American education. Premature ideas of independence, too little repressed by parents, beget a spirit of insubordination, which is the great obstacle to science with us and a principle cause of its decay since the revolution. I look to it with dismay in our institution, as a breaker ahead, which I am far from being confident we shall be able to weather.
>
> Thomas Jefferson
> Letter to Thomas Cooper, Nov. 2, 1822
> VII *The Works of Thomas Jefferson* 268 (1884)

Since the days Thomas Jefferson wrote to Mr. Cooper,[1] institutions of higher education have struggled with the responsibility of disciplining students. This task has been made more difficult because the legal relationship between a college or a university and its students

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* The authors gratefully acknowledge the editorial assistance of Barbara L. Shiels, Associate University Attorney at the University of Minnesota and co-chair of the NACUA Section on Student Affairs, and Kim A. Daffinger of Reed Smith Shaw & McClay, Pittsburgh, Pennsylvania. Without their comments, suggestions and diligent effort, this article would not have been possible. In addition, the authors are indebted to Rev. Bernard A. Hebda, J.D., J.C.L., of the Diocese of Pittsburgh for his efforts at writing a student code which is both fair and understandable and to Dr. Dennis C. Golden, Vice President for Student Affairs at the University of Louisville and NASPA President-elect, for his active leadership which inspired our efforts.

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[1] Thomas Cooper was the second President (1820-1835) of South Carolina College, later renamed the University of South Carolina. Mr. Jefferson was the founder of the University of Virginia.

has never fit neatly within one legal doctrine.[2] During the first part of the twentieth century, the concept of *in loco parentis*[3] predominated. Under this doctrine, courts viewed institutions as standing in the place of students' parents. Courts tended to give colleges and universities a great deal of discretion when they viewed the institutions as standing *in loco parentis*[4] to the students.

During the 1960s, however, courts began to move away from the concept of *in loco parentis*. Instead, courts viewed the relationship between student and institution as contractual. Under this view, institutions enter into contracts with their students to provide them with educational services in exchange for students' paying certain fees and obeying certain rules.[5] In addition, beginning with the landmark case of *Dixon v. Alabama Board of Education*,[6] in 1961, courts have required public institutions of higher learning to afford students due process[7] before taking disciplinary action.[8]

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[2] National Association of College and University Attorneys, STUDENT LEGAL ISSUES: ARTICLES RECOMMENDED BY THE NACUA SECTION ON STUDENT AFFAIRS at vii (1989). For a good historical overview, *see generally* Fowler, *The Legal Relationship Between the American College Student and the College: An Historical Perspective and the Renewal of a Proposal*, 13 J. L. & EDUC. 401 (1984).

[3] Literally, "in the place of a parent." BLACK'S LAW DICTIONARY 708 (5th ed. 1979).

[4] See Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913); Kaplin, *Law on the Campus 1960-1985: Years of Growth and Challenge*, 12 J.C.U.L. 269, 272 (1985); Note, *Reasonable Rules, Reasonably Enforced — Guidelines for University Disciplinary Proceedings*, 53 MINN. L. REV. 301, 310 (1968).

[5] See, *e.g.*, Dartmouth Review v. Dartmouth College, No. 88-E-111, slip op. at 13 (N.H. Super. Ct. Jan. 3, 1989); Prusack v. State, 117 A.D.2d 729, 498 N.Y.S.2d 455 (1986); Corso v. Creighton Univ., 731 F.2d 529 (8th Cir. 1984); Cloud v. Trustees of Boston Univ., 720 F.2d 721 (1st Cir. 1983). *See also* Jennings, *Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed?*, 7 J.C.U.L. 191 (1981).

[6] 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930, 82 S. Ct. 368 (1961). For a discussion of the importance of *Dixon*, see Reidhaar, *The Assault on the Citadel: Reflections on a Quarter Century of Change in the Relationships Between the Student and the University*, 12 J.C.U.L. 343, 346 (1985); Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027, 1031-32 (1969).

[7] The fourteenth amendment to the United States Constitution provides in part: "No State shall . . . deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[8] Although *Dixon* has been referred to as a "landmark" decision, see Goss v. Lopez, 419 U.S. 565, 576 n.8, 95 S. Ct. 729, 737 n.8 (1975). A court as early as 1887 spoke in terms of a college student having certain rights to notice and a hearing before being dismissed from school. Commonwealth ex rel. Hill v. McCauley, 3 Pa. County Ct. 77 (1887).

Only public schools, or private schools which have the requisite amount of interaction with the state to constitute "state action," have been required to provide due process for their students. *See* Dartmouth Review, slip op. at 12; VanLoock v. Curran, 489 So.2d 525, 528 (Ala. 1986). *See generally* Silets, *Of Students' Rights and Honor: The Application of the Fourteenth Amendment's Due Process Strictures to Honor Code Proceedings at Private Colleges and Universities*, 64 DEN. U.L. REV. 47 (1987); Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 J. L. & EDUC.

Although courts no longer merely rubber-stamp college or university decisions, as they once may have done under the doctrine of *in loco parentis*, principles from all three views appear in student disciplinary cases. Courts afford institutions of higher education a great deal of discretion.[9] At the same time, however, they require colleges and universities to honor the contracts they make and to provide fair procedures.

Colleges and universities thus operate within a volatile environment. In order to ensure smooth administration, yet still to fulfill their responsibility of maintaining discipline within an educational environment, colleges and universities are well-advised to establish written student disciplinary codes.[10] For a public college or university, such a written code provides constitutionally-required notice to students, faculty and administrators concerning the institution's policies and procedures. It may also ensure against charges of unconstitutional arbitrary action, for example, allegations that the school singled out one student for particularly unfair treatment. The private institution too may avoid charges of arbitrary or unfair treatment by implementing a written student disciplinary code.[11] A written student code can benefit both public and private institutions, as well as students, by

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171 (1982); Annotation, *Action of Private Institution of Higher Education as Constituting State Action or Action Under Color of Law for Purposes of the Fourteenth Amendment and 42 U.S.C.S. § 1983*, 37 A.L.R. FED. 601 (1978). Students at private colleges and universities, however, have attempted to bring due process and other constitutional cases against private institutions. *See, e.g.*, Albert v. Carovano, 851 F.2d 561 (2d Cir. 1988); Cummings v. Virginia School of Cosmetology, 466 F. Supp. 780 (E.D. Va. 1979); Miller v. Long Island Univ., 85 Misc. 2d 393, 380 N.Y.S.2d 917 (N.Y. Sup. Ct. 1976). In addition, it should be noted that Dickinson College, the institution at issue in *McCauley*, is a private school, and the court still imposed "notice and hearing" requirements. 3 Pa. County Ct. 77.

For a comprehensive recent discussion of the state of the law with regard to whether due process applies to private college and university disciplinary proceedings, *see* Boehm v. University of Pa. School of Veterinary Medicine, 392 Pa. Super. 502 (1990).

[9] *See Dartmouth Review*, slip op. at 12; Schulman v. Franklin & Marshall College, 538 A.2d 49, 52 (Pa. Super. Ct. 1988).

[10] Indeed, some courts have required a written disciplinary code. In Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969), for example, the court ruled that the University of Wisconsin had acted unconstitutionally in sanctioning students for "misconduct" when no rules specifically defined what the University viewed as "misconduct." The court ruled that while a University had the *power* to punish misconduct, it had to promulgate rules describing such misconduct to avoid punishing students on the basis of unconstitutionally vague, overbroad criteria. 418 F.2d at 166-67. "Pursuant to appropriate rule or regulation, the University has the power to maintain order by suspension or expulsion of disruptive students. Requiring that such sanctions be administered in accordance with preexisting rules does not place an unwarranted burden upon university administrations." *Id.* at 168.

[11] Wise policy may sometimes involve granting students more rights than the Constitution requires. Wright, *supra* note 6, at 1035. *See also* W. KAPLIN, THE LAW OF HIGHER EDUCATION at 294, 312-14 (2d ed. 1985).

clearly setting forth the terms of the "contract" between the student and the school with respect to disciplinary matters.[12]

What follows is a model student code which college or university counsel and administrators may use in creating their own written student disciplinary code. Of course, decisions with regard to certain topics will depend upon the preference of each individual college or university. Such topics include choosing a person at the institution to administer student-code policies and procedures; establishing a minimum amount of notice of the alleged violation; setting a maximum period between the time students are notified of charges against them, and the day on which those charges are heard; and deciding who will determine sanctions. Nevertheless, the following model is a sound beginning upon which to build a student disciplinary code.

College or university counsel and administrators should keep a few principles in mind when drafting their own student disciplinary codes. First, the institution, whether public or private, should try to follow the general dictates of due process. Due process, roughly translated, means ensuring that procedures are fair to the accused student.[13] If an institution is public, it is required to grant due process.[14] If the institution is private, constitutional due process may not be required,[15] but the institution's actions may appear fairer and more reasonable to a court if it gives students as much procedural protection as would a public institution.

Second, although college discipline is sometimes seen as the "criminal law of university government,"[16] student disciplinary codes need not be drafted with the specificity of criminal statutes.[17] In fact, to avoid indicating that it expects its student code to be treated like a criminal statute, a college or university should avoid language implying that criminal standards apply.[18] Any code promulgated by a college or university should, however, be sufficiently specific to make the rules clear.[19]

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[12] There is one negative aspect to the promulgation of a written student code. "Although the trend toward written codes is a sound one, legally speaking, because it gives students fairer notice of what is expected from them and often results in a better-conceived and administered system, written rules also provide a specific target to aim at in a lawsuit." W. KAPLIN, *supra* note 11, at 292.

For this reason, the institution should be aware that if it chooses to have a written student disciplinary code, it must follow the dictates of that code. Tedeschi v. Wagner College, 49 N.Y.2d 652, 658-60, 404 N.E.2d 1302, 1305-06 (1980); VanLoock v. Curran, 489 So.2d at 528; W. KAPLIN, *supra* note 11, at 302. *See* Warren v. Drake Univ., 886 F.2d 200, 202 (8th Cir. 1989).

[13] *See, e.g.*, Clayton v. Trustees of Princeton Univ., 608 F. Supp. 413, 435-36 (D.N.J. 1985).

[14] *See supra* note 8; Miles, *The Due Process Rights of Students in Public School or College Disciplinary Hearings*, 48 ALA. LAW. 144, 146 (1987) ("It is a good idea for a school or college to grant as much due process as it thinks is allowable, given a balance between the circumstances, the educational mission of the school and the rights of the student."); W. KAPLIN, *supra* note 11, at 302-07.

[15] *See supra* note 8.

[16] Comment, *Private Government on the Campus — Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1364 (1963).

[17] Note, *Due Process Rights in Student Disciplinary Matters*, 14 J.C.U.L. 359, 367 n.43 (1987).

Third, student code drafters should be aware that, as in any generic document, the principles set forth in the model student code represent the generally prevailing law. In some instances, courts disagree.[20] In others, administrators hold opposing views.[21] In these cases, the model either offers the drafters alternative choices or advocates the position taken by the majority of courts or schools, while noting that the position taken is not unanimously held. As with any form document, college or university counsel should review case law in his or her own jurisdiction to ensure that the institution is not bound by opposing precedent.

Finally, although such a section is not included in this model student code, the college or university should try to emphasize, in addition to its prohibitions, rights which it recognizes. This can be included in a preamble to the student code[22] or in the college or university handbook.[23] The institution thereby assures its students that it does not intend to take away rights,[24] but intends merely to control action going beyond the exercise of such rights. The institution can thus help to insulate itself from student attacks based upon allegations that the student code violates some constitutional right.[25]

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18. A college or university would not want to use terms such as "guilty" or "beyond a reasonable doubt," for example. Nor would it want to describe its hearings as "trials," the persons presenting the evidence of violations as "prosecutors" or the students who are alleged to have violated the code of conduct as "defendants."

19. Picozzi, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132, 2155 (1987) (written rules ensure that both the administrator and the student know what process is due an accused student).

On the other hand, a college or university often wants to draft its student code without too much specificity in order to preserve as much flexibility as possible.

20. *See, e.g.*, *infra* notes 68 and 72.

21. *See, e.g.*, *infra* notes 50-51 and accompanying text.

22. *See, e.g.*, University of Pittsburgh Student Code of Conduct and Judicial Procedures at 3-5; The George Washington University Guide to Student Rights and Responsibilities at 1 (both available from NACUA).

23. *See, e.g.*, Policy Statement, University of Michigan Interim Policy on Discrimination and Discriminatory Conduct by Students in the University Environment at 1 (available from NACUA).

24. *See* Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 89 S. Ct. 733 (1968) (first amendment applies in public high school context). Because of cases such as *Tinker*, public institutions must ensure that their students are guaranteed, *inter alia*, first-amendment rights.

25. Stating that students are guaranteed such rights, however, will not always ensure that the school will not be attacked. In Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989), the University was careful to provide in the preamble to its Interim Policy on Discrimination and Discriminatory Conduct by Students in the University Environment that it promoted:

> a strong commitment to the principle of freedom of speech guaranteed by the

The following model student code is organized so that all concerned—students, administrators and faculty members—can understand the concepts embodied therein. It progresses from a general definition section to a section outlining the authority of the institution's judicial bodies, a description of misconduct covered by the code, an outline of the procedures for bringing charges of misconduct, holding hearings and deciding appeals and, finally, a section on interpretation and revision of the code. The commentary following each section sets forth not only the practical reason for including each section within the code, but also the legal support for each provision, and, in some cases, suggestions on how the college or university attorney could approach certain situations.

In the final analysis, even the adoption of a sound student code, coupled with enlightened administration, will not eliminate the "spirit of insubordination" which Thomas Jefferson saw as such a significant problem for higher education nearly a century-and-three-quarters ago. Indeed, as Mr. Jefferson recognized, such insubordination results, in part, from the "ideas of independence" which are the backbone of our liberties, not only in higher education, but also in the world at large.

To the captains of our ships of higher education, therefore, the calm waters of consistently proper student behavior are unlikely ever to be reached. Instead, as Mr. Jefferson feared, the challenges of student discipline are likely always to loom as breakers ahead. Nevertheless, a sound student code following this model, like a sound ship under a sailing captain of old, will enable college and university administrators to navigate confidently past the dangers of insubordination, even when those dangers are accompanied, as they often are, by storm clouds of public concern and campus unrest.

> First Amendment to the United States Constitution . . . . The University is dedicated to allowing students vigorous and open academic discourse and intellectual inquiry, including speech that espouses controversial or even offensive ideas.

Such pronouncements did not protect the University from a ruling holding invalid its policy which prohibited, *inter alia*, "threats or verbal slurs, invectives or epithets referring to an individual's race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age or handicap made with the purpose of injuring the person to whom the words or actions are directed and that are not made as a part of a discussion or exchange of an idea, ideology or philosophy." The court found that the policy was both overbroad in that it prohibited some speech protected by the first amendment and so vague that it deprived students of due process.

Of course, private universities are not required to ensure that their students receive first-amendment freedoms. *See, e.g.*, Doe v. University of Mich., 721 F. Supp. 852, 867. Nevertheless, the private college or university should endeavor to ensure such protections. Confusion often arises over whether the first amendment applies in cases involving private institutions. Assuming that it does for purposes of assuring students of the institution's good intentions will make the institution's actions appear more reasonable in the face of a challenge.

MODEL STUDENT CODE

ARTICLE I: DEFINITIONS[26]

1. The term [College] [University] means [name of institution].
2. The term "student" includes all persons taking courses at the [College] [University], both full-time and part-time, pursuing undergraduate, graduate, or professional studies and those who attend post-secondary educational institutions other than [name of institution] and who reside in [College] [University] residence halls. Persons who are not officially enrolled for a particular term but who have a continuing relationship with the [College] [University] are considered "students."

Commentary. This definition is intended to include persons not enrolled for a particular term but who enroll for courses from time to time, perhaps toward a degree. Such persons would be expected to honor the Student Code even between periods of their actual enrollment.

3. The term "faculty member" means any person hired by the [College] [University] to conduct classroom activities.
4. The term "[College] [University] official" includes any person employed by the [College] [University], performing assigned administrative or professional responsibilities.
5. The term "member of the [College] [University] community" includes any person who is a student, faculty member, [College] [University] official or any other person employed by the [College] [University]. A person's status in a particular situation shall be determined by [title of appropriate college or university administrator].[27]
6. The term "[College] [University] premises" includes all land, buildings, facilities, and other property in the possession of or owned, used, or controlled by the [College] [University] (including adjacent streets and sidewalks).
7. The term "organization" means any number of persons who have complied with the formal requirements for [College] [University] [recognition/registration].

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[26] The authors recommend that, as in every good legal document, a student code should contain a section in which the code's drafters define all the terms of art that will appear throughout the code. Following is a partial list of definitions recommended for use with a college or university's student code. Definitions of some terms will, of course, vary with the type of disciplinary system established, and with the institution's traditional definitions of certain concepts (plagiarism or cheating, for example).

[27] The college or university must designate a person within its administration to oversee the operation of the student code and to be responsible for its administration. See *infra* Article I, number 13. The person designated should be the same person assigned under Article V, Section A, to resolve other questions of interpretation.

8. The term "judicial body" means any person or persons authorized by the [title of administrator identified in Article I, number 13][28] to determine whether a student has violated the Student Code and to recommend imposition of sanctions.

Commentary. A "judicial body," sometimes called a "hearing board," need not be comprised of any particular number of persons. Concerns recur about the composition of such bodies. An impartial decisionmaker is essential to due process.[29] *Courts have recognized, however, that in the college or university context it is often impossible to assemble a group of people who have not in some way heard of the charges at issue or who do not know the person(s) involved.*[30] *Frequently, "judicial bodies" which determine whether the Student Code has been violated include both students and faculty members or administrators. In this model, the code administrator defines the composition of hearing boards, but if the history or social system on campus dictates otherwise, the composition may be defined in more detail in the Student Code.*

9. The term "Judicial Advisor" means a [College] [University] official authorized on a case-by-case basis by the [title of administrator identified in Article I, number 13] to impose sanctions upon students found to have violated the Student Code. The [title of administrator identified in Article I, number 13] may authorize a judicial advisor to serve simultaneously as a judicial advisor and the sole member or one of the members of a judicial body. Nothing shall prevent the [title of administrator identified in Article I, number 13] from authorizing the same judicial advisor to impose sanctions in all cases.

Commentary. Just as courts have recognized that persons comprising a judicial body may have prior knowledge of the events at issue or the person(s) involved, they have recognized that it

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[28] The person who authorizes the judicial body should be the same one designated to be responsible for the administration of the student code. *See infra* Article I, number 13.

[29] Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1279 (1975).

[30] "Members of the college community, including students, usually comprise the hearing board. Given the nature of the academic community, members of the hearing board may know the student outside the context of the disciplinary proceedings." Note, *supra* note 17, at 371. *See* Nash v. Auburn Univ., 812 F.2d 655, 666 (11th Cir. 1987) (participation of a student justice with prior knowledge of the charge did not indicate bias); Gorman v. University of R.I., 837 F.2d 7, 15 (1st Cir. 1988). *But see* Note, *supra* note 17, at 372 ("[w]hile a board member has no constitutional obligation of recusation, fundamental fairness may suggest this action as in the best interest of both parties").

is sometimes impossible on a college campus to avoid having one person occupy two roles with respect to disciplinary proceedings.[31] *While it is not improper, whenever possible the college or university should avoid putting someone in the position of "wearing two hats." If the size of the institution's staff permits, it is decidedly preferable to have the functions of informal investigating and/or mediating separated from that of determining whether a violation has occurred and setting the sanction. Admittedly, such separation can be achieved more easily at large institutions. Thus, this Model recognizes the advisability of separating the functions when possible, while preserving the flexibility to combine functions—which usually will be a fact of life at smaller institutions. A student challenging a hearing board's decision on the grounds of bias must, in order to win the case, prove actual bias or that the board acted improperly.*[32] *This model anticipates that a college or university official will determine sanctions after a violation has been found. In some systems sanctions are set by students.*

10. The term "Appellate Board" means any person or persons authorized by the [title of administrator identified in Article I, number 13] to consider an appeal from a judicial body's determination that a student has violated the Student Code or from the sanctions imposed by the Judicial Advisor.
11. The term "shall" is used in the imperative sense.
12. The term "may" is used in the permissive sense.
13. The [title of appropriate administrator] is that person designated by the [College] [University] President to be responsible for the administration of the Student Code.
14. The term "policy" is defined as the written regulations of the [College] [University] as found in, but not limited to, the Student Code, Residence Life Handbook, and Graduate/Undergraduate Catalogs.

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[31] Winnick v. Manning, 460 F.2d 545, 548 (2d Cir. 1972); *Gorman*, 837 F.2d at 15; Hillman v. Elliott, 436 F. Supp. 812, 816 (W.D. Va. 1977). *Cf.* Megill v. Board of Regents, 541 F.2d 1073, 1079 (5th Cir. 1976); Duke v. North Tex. State Univ., 469 F.2d 829, 834 (5th Cir. 1972); Alex v. Allen, 409 F. Supp. 379, 387-88 (W.D. Pa. 1976).

[32] "[T]he law indulges the presumption that school authorities act reasonably and fairly and in good faith in exercising the authority with which it clothes them, and casts the burden on him who calls their conduct into question to show that they have not been activated by proper motives." Barker v. Hardway, 283 F. Supp. 228, 237 (S.D. W. Va. 1968), *aff'd* 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905, 89 S. Ct. 1009 (1969). *See also* Dartmouth Review v. Dartmouth College, No. 88-E-111, slip op. at 18 (N.H. Jan. 3, 1989); Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 1003 (5th Cir. 1975); *Winnick*, 462 F.2d at 548. *Cf.* Levitt v. University of Tex., 759 F.2d 1224, 1228 (5th Cir. 1985).

Commentary. Listed herein is a sampling of the types of other sources of rules and regulations governing colleges or universities.

15. The term "cheating" includes, but is not limited to: (1) use of any unauthorized assistance in taking quizzes, tests, or examinations; (2) dependence upon the aid of sources beyond those authorized by the instructor in writing papers, preparing reports, solving problems, or carrying out other assignments; or (3) the acquisition, without permission, of tests or other academic material belonging to a member of the [College] [University] faculty or staff.
16. The term "plagiarism" includes, but is not limited to, the use, by paraphrase or direct quotation, of the published or unpublished work of another person without full and clear acknowledgment. It also includes the unacknowledged use of materials prepared by another person or agency engaged in the selling of term papers or other academic materials.

Commentary. Cheating and plagiarism are the two most common types of academic misconduct.[33] *The courts' views about institutional decisions regarding such academic misconduct will be discussed in greater detail hereinafter.*[34]

ARTICLE II: JUDICIAL AUTHORITY

1. The Judicial Advisor shall determine the composition of judicial bodies and Appellate Boards and determine which judicial body, Judicial Advisor and Appellate Board shall be authorized to hear each case.
2. The Judicial Advisor shall develop policies for the administration of the judicial program and procedural rules for the conduct of hearings which are not inconsistent with provisions of the Student Code.
3. Decisions made by a judicial body and/or Judicial Advisor shall be final, pending the normal appeal process.
4. A judicial body may be designated as arbiter of disputes within the student community in cases which do not involve a violation of the Student Code. All parties must agree to arbitration, and to be bound by the decision with no right of appeal.

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[33] Fox, *Due Process and Student Academic Misconduct*, 25 AM. BUS. L.J. 671, 671-72 (1988).

[34] *See infra* text accompanying notes 40-43.

ARTICLE III: PROSCRIBED CONDUCT

A. Jurisdiction of the [College] [University]

Generally, [College] [University] jurisdiction and discipline shall be limited to conduct which occurs on [College] [University] premises or which adversely affects the [College] [University] Community and/or the pursuit of its objectives.

> *Commentary. The college or university should state in general terms the conduct which the institution intends to reach. A college or university has jurisdiction to punish a student for activities which take place off-campus when those activities adversely affect the interests of the college or university community. School officials have wide latitude in determining whether an activity adversely affects the interests of the university community.*[35]
>
> *Under this Model Student Code, when an activity occurs off-campus, it would be the responsibility of the administrator designated in Article I, number 13, to determine whether college or university jurisdiction should be asserted.*[36] *Utilizing this procedure on a case-by-case basis allows the institution to consider the unique facts of each situation without the impossible problem of drafting language to cover every possible situation.*

B. Conduct—Rules and Regulations

Any student found to have committed the following misconduct is subject to the disciplinary sanctions outlined in Article IV:

1. Acts of dishonesty, including but not limited to the following:
    a. Cheating, plagiarism, or other forms of academic dishonesty.
    b. Furnishing false information to any [College] [University] official, faculty member or office.

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[35] *See* Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1068 (1968). In Kusnir v. Leach, 64 Pa. Commw. 65, 439 A.2d 223 (1982), a college disciplinary board suspended a student for two semesters for participating in misconduct at a private party at a private off-campus residence. The student asserted in part that the college lacked jurisdiction to punish students for off-campus misconduct. The court disagreed, saying the argument had "no merit:" "Obviously, a college has a vital interest in the character of its students, and may regard off-campus behavior as a reflection of a student's character and his fitness to be a member of the student body." Kusnir, 64 Pa. Commw. at 69, 439 A.2d at 226. *See also* Esteban v. Central Mo. State College, 415 F.2d 1077, 1088-89 (8th Cir. 1969); Hart v. Ferris State College, 557 F. Supp. 1379 (W.D. Mich. 1983); Sohmer v. Kinnard, 535 F. Supp. 50 (D. Md. 1982); Wallace v. Florida A & M Univ., 433 So.2d 600 (Fla. App. 1983); Annotation, *Misconduct of College or University Student Off Campus As Grounds for Expulsion, Suspension, or Other Disciplinary Action*, 28 A.L.R. 4th 463 (1984).

[36] *See infra* Article V, Section A.

c. Forgery, alteration, or misuse of any [College] [University] document, record, or instrument of identification.
d. Tampering with the election of any [College-] [University-] recognized student organization.

2. Disruption or obstruction of teaching, research, administration, disciplinary proceedings, other [College] [University] activities, including its public-service functions on or off campus, or other authorized non- [College] [University] activities, when the act occurs on [College] [University] premises.
3. Physical abuse, verbal abuse, threats, intimidation, harassment, coercion and/or other conduct which threatens or endangers the health or safety of any person.[37]
4. Attempted or actual theft of and/or damage to property of the [College] [University] or property of a member of the [College] [University] community or other personal or public property.
5. Hazing, defined as an act which endangers the mental or physical health or safety of a student, or which destroys or removes public or private property, for the purpose of initiation, admission into, affiliation with, or as a condition for continued membership in, a group or organization.[38]

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[37] A provision such as this one would bring within the Student Code incidents of alleged date rape. Despite the sensitive nature of this subject, institutions may wish to consider incidents of alleged date rape to be within the provisions of their Student Codes because doing so may afford an avenue of redress to complainants who feel uncomfortable pressing charges in court. *See* Wing, *Student Court to Judge Campus Date Rape Cases*, U., Nov. 1989, at 2, col. 1.

While this language is appropriate for a private university or college which need not worry unduly about due-process requirements under federal or state law, persons drafting a code at a public institution may wish to review with their institutional counsel whether more specific language is required in their situation. For example, the University of Michigan's Interim Policy on Discrimination and Discriminatory Conduct by Students in the University Environment was found to be unconstitutionally vague when it prohibited "[p]hysical acts or threats or verbal slurs, invectives or epithets referring to an individual's race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age or handicap made with the purpose of injuring the person to whom the words or actions are directed and that are not made as part of a discussion or exchange of an idea, ideology or philosophy." *See* Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989). That language is considerably more broad than the language proposed in this Model Student Code. *See generally*, Hodulik, *Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing of First Amendment and University Interests*, 16 J.C.U.L. 573 (1990).

[38] *See* PA. STAT. ANN. tit. 24, § 5352 (Purdon 1990 Supp.). In Pennsylvania, the legislature has promulgated an Antihazing Law, PA. STAT. ANN. tit. 24, §§ 5351-5354 (Purdon 1990 Supp.), which requires that all public or private institutions of higher education adopt a written antihazing policy and establish rules for enforcement of the policy and punishment of offenders. As part of this law, the legislature has defined what it considers to be hazing. *See also* ALA. CODE § 16-1-23 (1978) (defining hazing and classifying it as a Class C misdemeanor); ILL. REV. STAT. ch. 144, para. 222 (1989) (defining hazing); OHIO REV. CODE ANN. § 2903.31 (Baldwin 1986) (making hazing a fourth-degree misdemeanor). Student code drafters would be well-advised to determine

6. Failure to comply with directions of [College] [University] officials or law enforcement officers acting in performance of their duties and/or failure to identify oneself to these persons when requested to do so.
7. Unauthorized possession, duplication or use of keys to any [College] [University] premises or unauthorized entry to or use of [College] [University] premises.
8. Violation of published [College] [University] policies, rules or regulations.
9. Violation of federal, state or local law on [College-] [University-] premises or at [College] [University] sponsored or supervised activities.
10. Use, possession or distribution of narcotic or other controlled substances except as expressly permitted by law.
11. Use, possession or distribution of alcoholic beverages except as expressly permitted by the law and [College] [University] regulations, or public intoxication.
12. Illegal or unauthorized possession of firearms, explosives, other weapons, or dangerous chemicals on [College] [University] premises.
13. Participation in a campus demonstration which disrupts the normal operations of the [College] [University] and infringes on the rights of other members of the [College] [University] community; leading or inciting others to disrupt scheduled and/or normal activities within any campus building or area; intentional obstruction which unreasonably interferes with freedom of movement, either pedestrian or vehicular, on campus.
14. Obstruction of the free flow of pedestrian or vehicular traffic on [College] [University] premises or at [College-] [University-] sponsored or supervised functions.
15. Conduct which is disorderly, lewd, or indecent; breach of peace; or aiding, abetting, or procuring another person to breach the peace on [College] [University] premises or at functions sponsored by, or participated in by, the [College] [University].
16. Theft or other abuse of computer time, including but not limited to:
    a. Unauthorized entry into a file, to use, read, or change the contents, or for any other purpose.
    b. Unauthorized transfer of a file.
    c. Unauthorized use of another individual's identification and password.

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whether applicable state law provides a definition of hazing and, if so, to incorporate such definition into their code in order to make the provision self-executing, *i.e.*, to provide that, whenever a student is charged with hazing under state law, such actions would also constitute hazing under the student code.

- d. Use of computing facilities to interfere with the work of another student, faculty member or [College] [University] Official.
- e. Use of computing facilities to send obscene or abusive messages.
- f. Use of computing facilities to interfere with normal operation of the [College] [University] computing system.

17. Abuse of the Judicial System, including but not limited to:
    - a. Failure to obey the summons of a judicial body or [College] [University] official.
    - b. Falsification, distortion, or misrepresentation of information before a judicial body.
    - c. Disruption or interference with the orderly conduct of a judicial proceeding.
    - d. Institution of a judicial proceeding knowingly without cause.
    - e. Attempting to discourage an individual's proper participation in, or use of, the judicial system.
    - f. Attempting to influence the impartiality of a member of a judicial body prior to, and/or during the course of, the judicial proceeding.
    - g. Harassment (verbal or physical) and/or intimidation of a member of a judicial body prior to, during, and/or after a judicial proceeding.
    - h. Failure to comply with the sanction(s) imposed under the Student Code.
    - i. Influencing or attempting to influence another person to commit an abuse of the judicial system.

Commentary. Colleges or universities are, of course, free to include in their lists of misconduct as many types of acts as they choose, within certain limitations. The list of acts of misconduct which constitute violations of the Student Code should give students fair notice of the types of conduct which may result in sanctions. The college or university should, however, be careful to emphasize that the list is not all-inclusive. Otherwise, the college or university may be held to a contract, inadvertently created, to punish only misconduct listed, and none other.[39]

Courts tend to give college and university officials much greater freedom concerning purely academic decisions than they do concerning purely disciplinary decisions.[40] *Academic-misconduct cases*

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[39] It is a maxim of statutory interpretation that *expressio unius est exclusio alterius*, or to mention certain circumstances implies that the drafter meant to exclude all others. See BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

[40] See Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 106 S. Ct. 507 (1985); Board of Curators v. Horowitz, 435 U.S. 78, 98 S. Ct. 948 (1978). The dichotomy has developed because "disciplinary determinations are based on objective findings of fact

involving cheating or plagiarism, for example, present a unique hybrid of academic and disciplinary decisions.[41] *Because several courts have categorized cases of academic misconduct as disciplinary, rather than academic,*[42] *the authors suggest that institutions classify such "academic misconduct," as requiring the same procedures as cases involving purely disciplinary matters.*[43] *Academic misconduct may also be grounds for academic sanctions, such as the imposition of a lower grade. This system must be dove-tailed with the institutional process for student review of academic sanctions. Even if a faculty member imposes an academic sanction for an academic offense, the authors recommend that the student have the right to have the conduct reviewed under the Student Code. If these procedures produce a conclusion that the misconduct occurred, the Student Code procedures can uphold, increase, or reduce the sanction. If no violation is found, the sanction imposed by the faculty member must be lifted.*

Concerning items number three, thirteen, fifteen and seventeen, the college or university must ensure that regulations which may infringe upon the right of free speech do not violate the first amendment because of overbreadth or vagueness.[44] *They must*

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so that hearings are useful and appropriate in this context. However, academic determinations are quite different because they are more subjective and evaluative." Levin, *Constitutional Law—Due Process of Law*, 47 U. CIN. L. REV. 514, 517 (1978). *See Horowitz*, 435 U.S. at 87-91, 98 S. Ct. at 953-56. *See generally* Wilhelm, *Academic or Disciplinary Decisions: When is Due Process Required?*, 6 U. BRIDGEPORT L. REV. 391 (1985); Fournet, *Due Process and the University Student: The Academic/Disciplinary Dichotomy*, 37 LA. L. REV. 939 (1977); W. KAPLIN, *supra* note 11, at 307-12.

[41] Fox, *Due Process and Student Academic Misconduct*, 25 AM. BUS. L.J. at 672.

[42] *See, e.g.*, Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1248 n.2 (E.D. Mich.), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986); Hall v. Medical College of Ohio, 742 F.2d 299, 308-09 (6th Cir. 1984). *But see* Corso v. Creighton Univ., 731 F.2d 529, 532 (8th Cir. 1984) ("[c]heating on exams is clearly an academic matter"); Garshman v. Pennsylvania State Univ., 395 F. Supp. 912, 921 (M.D. Pa. 1975) ("a determination as to the academic honesty of a student is . . . peculiarly within the discretion of a college administrator"); McDonald v. Board of Trustees, 375 F. Supp. 95, 104 (N.D. Ill.) *aff'd*, 503 F.2d 105 (7th Cir. 1974). *See also* Roberts, *Public University Responses to Academic Dishonesty: Disciplinary or Academic*, 15 J.L.& EDUC. 369 (1986) (cases cited at footnotes 16 through 32 therein).

[43] Incidents of cheating and plagiarism generally involve some degree of fact-finding. "If the academic dishonesty matter includes factual disputes, university officials should grant the student the same procedural safeguards as those in a disciplinary matter." Note, *supra* note 16, at 364. *See also* Roberts, *supra* note 42, at 384 ("even if a public university classifies the punishment of cheating as an academic matter, the courts may not hold the same view").

[44] Regulation of speech is an intricate area of the law. *See generally* Hodulik, *supra* note 36. In Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989), the United States District Court for the Eastern District of Michigan, Southern Division, invalidated a portion of the University of Michigan's policy on discrimination and discriminatory conduct because the sweeping provisions of that policy could be, and in fact had been, used to punish students for activity protected by the first amendment. *See supra* note

also ensure that it is not an abuse of the judicial system (i.e., a

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37. *But see* Students Against Apartheid Coalition v. O'Neil, 838 F.2d 735 (4th Cir. 1988) (University of Virginia's regulation prohibiting temporary structures on the south side of rotunda in order to preserve integrity of upper lawn, a historical architectural area, did not violate the first amendment because it was content-neutral, narrowly tailored to meet a significant government interest and left open other avenues of communication).

After extensive study and debate, the University of Wisconsin System recently adopted administrative rules aimed at prohibiting discriminatory harassment. *See* Hodulik, *supra* note 36, at 574-75. The rules (in part) provide as follows:

> UWS 17.06 Offenses defined. The university may discipline a student in nonacademic matters in the following situations:
>
> . . .
>
> (2)(a) For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets, other expressive behavior or physical conduct intentionally:
>
> 1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
>
> 2. Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.
>
> (b) Whether the intent required under par. (a) is present shall be determined by consideration of all relevant circumstances.
>
> . . .
>
> (c) In order to illustrate the types of conduct which this subsection is designed to cover, the following examples are set forth. These examples are not meant to illustrate the only situations or types of conduct intended to be covered.
>
> 1. A student would be in violation if:
>
> a. He or she intentionally made demeaning remarks to an individual based on that person's ethnicity, such as name calling, racial slurs, or "jokes"; and
>
> b. His or her purpose in uttering the remarks was to make the educational environment hostile for the person to whom the demeaning remark was addressed.
>
> 2. A student would be in violation if:
>
> a. He or she intentionally placed visual or written material demeaning the race or sex of an individual in that person's university living quarters or work area; and
>
> b. His or her purpose was to make the educational environment hostile for the person in whose quarters or work area the material was placed.
>
> 3. A student would be in violation if he or she seriously damaged or destroyed private property of any member of the university community or guest because of that person's race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.
>
> 4. A student would not be in violation if, during a class discussion, he or she expressed a derogatory opinion concerning a racial or ethnic group. There is no violation, since the student's remark was addressed to the class as a whole, not to a specific individual. Moreover, on the facts as stated, there seems no evidence that the student's purpose was to create a hostile environment.

Compare University of California Student Conduct, *Policies Applying to Campus Activities, Organizations and Students (Part A)*, § 51.00 (pertinent portion available from NACUA).

The Wisconsin rule has been challenged in federal district court. *See* UWM Post v. Board, No. 90-C-0328, slip op. (E.D. Wis. 1990). The plaintiffs contended that Rule 17.06 violated the first and fourteenth amendments to the United States Constitution and article I, sections 1 and 3, of the Wisconsin Constitution. Hodulik, *supra* note 37, at 573. This *violation of item number sixteen) for persons to attend the hearing but to refuse to testify by asserting their fifth-amendment right not to incriminate themselves.*[45] *A person may assert the privilege against self-incrimination as to possible criminal exposure during a civil proceeding.*[46] *In the college disciplinary setting, the student may remain silent, and such silence should not be used against the student,*[47] *but a violation of the Student Code may nevertheless be found based upon the other evidence presented.*

C. Violation of Law and [College] [University] Discipline

1. **If a student is charged only with an off-campus violation of federal, state, or local laws, but not with any other violation of this Code, disciplinary action may be taken and sanctions imposed for grave misconduct which demonstrates flagrant disregard for the [College] [University] community. In such cases, no sanction may be imposed unless the student has been found guilty in a court of law or has declined to contest such charges, although not actually admitting guilt (e.g., "no contest" or "nolo contendere").**

Commentary. The college or university may punish off-campus violations of the law if such misconduct affects the college or university community.[48]

2. [Alternative A]
[College] [University] disciplinary proceedings may be instituted against a student charged with violation of a law which is also a violation of this Student Code, for example, if both violations result from the same factual situation, without regard to the pendency of civil litigation in court or criminal arrest and prosecution. Proceedings under this Student Code may be carried out prior to, simultaneously with, or following civil or criminal proceedings off-campus.
[Alternative B]
If a violation of law which also would be a violation of this Student Code is alleged, proceedings under this Student Code

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challenge is sure to add to the complexity of first amendment jurisprudence in this area. *See generally*, T. HUSTOLES & W.B. CONNOLLY, JR., REGULATING RACIAL HARASSMENT ON CAMPUS: A LEGAL COMPENDIUM (NACUA 1990). *See also* Outlines presented in Concurrent Session, 1990 NACUA Conference, "Racial Harassment and the First Amendment" (available from NACUA).

[45] The fifth amendment provides in part that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

[46] *See* Picozzi v. Sandalow, 623 F. Supp. 1571, 1582 (E.D. Mich.) *aff'd*, 827 F.2d 770 (6th Cir. 1987); Note, *supra* note 17, at 377-79.

[47] *See* Hart v. Ferris State College, 557 F. Supp. at 1384-85. *Cf.* Garrity v. New Jersey, 385 U.S. 493, 87 S. Ct. 616 (1967).

[48] *See supra* note 35 and accompanying text.

may go forward against an offender who has been subjected to civil prosecution only if the [College] [University] determines that its interest is clearly distinct from that of the community outside the [College] [University]. Ordinarily, the [College] [University] should not impose sanctions if public prosecution of a student is anticipated, or until law enforcement officials have disposed of the case.[49]

Commentary. A college or university may take student disciplinary action before criminal charges arising out of the same facts are resolved.[50] *There are two basic approaches to the recurring dilemma of how a college or university should proceed when a student is accused not only of violating school regulations, but also of breaking the law. Alternative A is the pro-active approach, in which the institution has reserved the authority to take action under the Student Code in all such situations. A college or university may choose this approach because it does not wish to trivialize its code. To postpone the use of its disciplinary code and system of hearings and appeals in those cases involving criminal conduct would lead, in the words of one court, to an "absurd situation:" A student who violated a rule or regulation short of committing a crime receives immediate discipline, while a student who committed a more serious offense is entitled to attend school without immediate disciplinary action.*[51] *Alternative B illustrates the other approach. Although such an approach is not often admitted explicitly, it is not uncommon. It does, however, lead to a Student Code which deals only with minor offenses. The authors recommend Alternative A.*

3. When a student is charged by federal, state or local authorities with a violation of law, the [College] [University] will not request or agree to special consideration for that individual because of his or her status as a student. If the alleged offense is also the subject of a proceeding before a judicial body under the Student Code, however, the [College] [University] may advise off-campus authorities of the existence of the Student Code and of how such matters will be handled internally within the [College] [University] community. The [College] [University] will cooperate fully with

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[49] The University of Kansas, You and the University of Kansas, Student Handbook, 1988-89, as quoted in Richmond, *Students' Right to Counsel in University Disciplinary Proceedings*, 15 J.C.U.L. 289, 312 n.166 (1989).

[50] Gabrilowitz v. Newman, 582 F.2d 100, 104 (1st Cir. 1978); *Hart*, 557 F. Supp. at 1384; Furutani v. Ewigleben, 297 F. Supp. 1163 (N.D. Cal. 1969); Goldberg v. Regents of Univ. of Cal., 248 Cal. App.2d 867, 57 Cal. Rptr. 463 (1967); Nzuve v. Castleton State College, 133 Vt. 225, 335 A.2d 321 (1975). *Cf.* Peiffer v. Lebanon School Dist., 848 F.2d 44 (3d Cir. 1988). *See, e.g.*, Warren v. Drake Univ., 886 F.2d 200 (8th Cir. 1989).

[51] Johnson v. Board of Educ., 62 Misc.2d 929, 310 N.Y.S.2d 429, 433 (1970).

law enforcement and other agencies in the enforcement of criminal law on campus and in the conditions imposed by criminal courts for the rehabilitation of student violators. Individual students and faculty members, acting in their personal capacities, remain free to interact with governmental representatives as they deem appropriate.

Commentary. Counsel for the college or university should establish a solid relationship with the local prosecuting attorney in anticipation of such situations. The college or university attorney should educate the prosecuting attorney about the institution's student code and its general philosophy regarding discipline. By doing this, the institution may better coordinate its efforts with that of the prosecuting attorney when a disciplinary problem overlapping criminal charges arises. In addition, the prosecuting attorney who understands that the college or university will handle matters appropriately may bypass intervention, choosing instead to allow the institution to handle the situation. Finally, familiarizing the prosecuting attorney with the student code before an incident arises helps avoid media errors, subsequent retractions and negative publicity when an incident arises. This area requires a delicate balance, good judgment, and an appreciation of the separate rules of student discipline and law enforcement. College officials must take care not to attempt, or appear to attempt, to influence prosecutorial decisionmaking. Although the campus and criminal systems must remain distinct, with neither dictating to the other, it is nevertheless important to have a clear line of communication.

Besides working with the prosecuting attorney, the college or university attorney should establish a relationship with the attorney for the accused student. This is important because the university attorney can help the defense attorney make an informed decision as to whether the accused student should submit to the school's disciplinary proceedings. For example, if the accused student is found to have violated university rules, university, not criminal, sanctions will be imposed. These sanctions most likely will be less severe than criminal sanctions. Complainants who feel vindicated and satisfied with the result of the institutional disciplinary hearing may be inclined to drop the criminal charges. In any case, the institution's representative must be mindful of a fair result for both the student who has alleged a violation of the Student Code and the alleged violator.

This in turn will alleviate the burden on the prosecuting attorney, whose offices are traditionally understaffed and overworked. Moreover, the student "victim" will be able to present testimony in an atmosphere less antagonistic than criminal court.

Article IV: Judicial Policies

A. Charges and Hearings

1. Any member of the [College] [University] community may file charges against any student for misconduct. Charges shall be prepared in writing and directed to the Judicial Advisor responsible for the administration of the [College] [University] judicial system. Any charge should be submitted as soon as possible after the event takes place, preferably within [specified amount of time].

Commentary. This section not only describes who may file charges, but also requires that such charges be in writing and that they all be submitted to the same person. Such measures are desirable because: (1) they ensure that college or university officials can immediately assess the gravity of each complaint; and (2) they serve to provide notice in an orderly fashion.[52] *The use of a standard form for charges will ensure the receipt of all the necessary information.*[53]

Practice varies widely concerning the length of limitations periods. For example, at Westminster College complainants are asked to file charges within forty-eight (48) hours.[54] *At Pratt Institute, charges of discriminatory treatment must be submitted within twenty-eight (28) days of the date the complainant first attempted to resolve the matter, which must be done within ninety (90) days of the incident.*[55] *Finally, at Northwestern University, complainants have one year during which to file charges.*[56]

2. The Judicial Advisor may conduct an investigation to determine if the charges have merit and/or if they can be disposed of administratively by mutual consent of the parties involved on a basis acceptable to the Judicial Advisor. Such disposition shall be final and there shall be no subsequent proceedings. If the charges cannot be disposed of by mutual consent, the Judicial Advisor may later serve in the same matter as the judicial body or a member thereof.

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[52] See Picozzi, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132, 2157 n.107 (1987).

[53] See, e.g., Office of Student Affairs, Westminster College, *Student Handbook Bulletin 1989-90* at 14.

[54] *Id.*

[55] Pratt Institute Non-Discrimination Grievance Procedures at 1-2 (available from NACUA).

[56] Northwestern University Offenses and Hearing Procedures at 24 (available from NACUA).

Commentary. As noted previously,[57] courts have recognized that it is not possible in the college or university setting to ensure that the participants in the disciplinary process have not had prior contact with the student(s) involved or prior knowledge of the events which are the subject of the proceeding. Where staffing permits, it is preferable to separate the administrative and judicial functions.

3. All charges shall be presented to the accused student in written form. A time shall be set for a hearing, not less than five nor more than fifteen calendar days after the student has been notified. Maximum time limits for scheduling of hearings may be extended at the discretion of the Judicial Advisor.

Commentary. Notice and an opportunity to be heard are essential to all student disciplinary proceedings, at least in the public college and university settings.[58]

Requiring that the accused student receive written notice of the charge ensures that the accused student receives adequate notice of the alleged violations. Such notice should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[59]

Further, there is no bright-line rule governing how far in advance of a hearing notice should be given.[60] Indeed, some courts have

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[57] *See supra* notes 29-32 and accompanying text. In Nash v. Auburn Univ., 812 F.2d 655 (11th Cir. 1987) the court required evidence of actual bias on the part of a student justice, refusing to hold that the accused students had been denied a bias-free tribunal merely because one student justice knew of suspicions about the student and had had prior contact with potential witnesses. *Id. See also*, Gorman v. University of R.I., 837 F.2d 7, 15 (1st Cir. 1988), where the court rejected the accused student's contention that a university administrator's function both as advisor to the disciplinary board and as a non-voting member of the Board evidenced bias. Because there was no actual evidence of bias, the court noted that this argument "assumes too much." ("[I]n the intimate setting of a college or university, prior contact between the participants is likely, and does not *per se* indicate bias or partiality"); Dartmouth Review v. Dartmouth College, slip op. No. 88-E-111 at 18-20 (N.H. Jan. 3, 1989).

[58] Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729 (1975). *See generally* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 105 S. Ct. 1487, 1495 (1985) (procedural due process for employee about to be terminated requires notice of charges, oral or written statement of employer's side and opportunity to rebut); Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011 (1970). *See also* Cooper & Strope, *Long-Term Suspensions and Expulsions After Loss*, 57 EDUC. LAW REP. 29 (1989).

[59] Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13, 98 S. Ct. 1554, 1562 (1978), quoting Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950). The court in *Goss* stated that the student must be told "what he is accused of doing and what the basis of the accusation is." 419 U.S. at 582. The court in Dixon v. Alabama Bd. of Educ. required "a statement of the specific charges and grounds." 294 F.2d 150, 158 (5th Cir. 1961).

[60] *See Nash*, 812 F.2d at 661.

indicated that notice of charges may be given at the same time the student has an opportunity to defend against those charges.[61] *Nevertheless, it seems fairer to give some reasonable amount of time to allow accused students to prepare their defenses. Proper notice may benefit the institution if a student challenges its actions.*[62] *The institution must, however, be sure to follow its own rules once it establishes an amount of time which is to pass between notice and the hearing.*[63]

Granting the Judicial Advisor discretion to extend the maximum time limits permits the institution flexibility in cases in which examination periods, breaks and holidays disrupt the time at which hearings would otherwise be scheduled. Some institutions may wish to deal with break and/or holiday issues more explicitly by providing in their codes for dates certain to be used in such situations. For example, a college or university may wish to provide that, in cases in which an examination period or break intervenes between the time of notice and the hearing date, hearings always will be held on the first day on which classes are again in session.

4. Hearings shall be conducted by a judicial body according to the following guidelines:
   a. Hearings normally shall be conducted in private. At the request of the accused student, and subject to the discretion of the chairperson, a representative of the student press may be admitted, but shall not have the privilege of participating in the hearing.
   b. Admission of any person to the hearing shall be at the discretion of the judicial body and/or its Judicial Advisor.
   c. In hearings involving more that one accused student, the chairperson of the judicial body, in his or her discretion, may permit the hearings concerning each student to be conducted separately.
   d. The complainant and the accused have the right to be assisted by any advisor they choose, at their own expense. The advisor may be an attorney. The complainant and/or the accused is responsible for presenting his or her own case and, therefore, advisors are not permitted to speak or to participate directly in any hearing before a judicial body.
   e. The complainant, the accused and the judicial body shall have the privilege of presenting witnesses, subject to the right of cross examination by the judicial body.

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[61] *Goss*, 419 U.S. at 582, 95 S. Ct. at 740.

[62] Note, *supra* note 17, at 370.

[63] *See supra* note 12.

f. Pertinent records, exhibits and written statements may be accepted as evidence for consideration by a judicial body at the discretion of the chairperson.

g. All procedural questions are subject to the final decision of the chairperson of the judicial body.

h. After the hearing, the judicial body shall determine (by majority vote if the judicial body consists of more than one person) whether the student has violated each section of the Student Code which the student is charged with violating.

i. The judicial body's determination shall be made on the basis of whether it is more likely than not that the accused student violated the Student Code.

Commentary. The law requires no particular form of hearing.[64] *For two reasons, however, the institution should establish guidelines pursuant to which hearings are to be conducted. First, doing so will ensure that the institution always treats students accused of misconduct evenhandedly. That is, a college or university can feel safe in knowing that, as long as the student disciplinary board follows the procedures set forth in its code, each accused student will receive the same treatment. Thus, there is less opportunity for any student to complain of unequal treatment. Second, establishing such guidelines in advance will avert snap decisions concerning such issues as whether to permit a student to have counsel or whether the hearing should be public.*

This compendium of hearing guidelines incorporates the following legal principles: First, the hearing need not be open to the public.[65] *Second, neither the Federal Rules of Evidence nor any state's rules of evidence apply in student disciplinary proceedings.*[66] *Third, although the courts are split on the issue,*[67] *a student need not be permitted to be represented by counsel at most student disciplinary hearings.*[68]

There are two possible exceptions to this rule: First, a public

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[64] *Goss*, 419 U.S. at 583-84, 95 S. Ct. at 740-41; *Dixon*, 294 F.2d at 158-59.

[65] Hart v. Ferris State College, 557 F. Supp. 1379, 1389 (W. D. Mich. 1983).

[66] Nash v. Auburn Univ., 812 F.2d 655, 665 (11th Cir. 1987); Boykins v. Fairchild Bd. of Educ., 492 F.2d 697, 701 (5th Cir. 1974).

[67] *See* Blaskey, *University Students' Right to Retain Counsel for Disciplinary Proceedings*, 24 CAL. W.L. REV. 65, 65-66 (1988); Note, *supra* note 17, at 372-73.

[68] *Compare* Marin v. University of P.R., 377 F. Supp. 613, 623-24 (D.P.R. 1974); Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972); Esteban v. Central Mo. State College, 277 F. Supp. 649, 651 (W.D. Mo.), *aff'd*, 415 F.2d 1077 (8th Cir.), *cert. denied*, 398 U.S. 965, 90 S. Ct. 21 (1970); French v. Bashful, 303 F. Supp. 1333, 1337 (E.D. La. 1969) (all recognizing a right to have counsel present at college or university disciplinary proceedings, although the court in *French* limited its holding to cases involving retained, rather than appointed, counsel) *with* Madera v. Board of Educ., 386 F.2d 778, 786-87 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028, 88 S. Ct. 1416 (1968); Everett v. Marcase, 426 F. Supp. 397 (E.D. Pa. 1977) (attorney need not be permitted).

institution's disciplinary board may be considered a state agency in some situations. Being deemed a state agency may bring into play certain state administrative agency laws, which may require representation by an attorney.[69] *Second, if criminal charges are either pending or potential, the college or university must permit the student to have counsel.*[70] *Even in these cases, however, counsel may be restricted to an advisory role.*[71] *It is not required that either students or counsel be given the opportunity to cross-examine witnesses. Cross-examination by the disciplinary hearing board is sufficient.*[72]

A smaller school may wish to institute either an arbitration or a mediation requirement prior to reaching the hearing stage.[73] *Such an option is acceptable because the concept of due process is flexible, requiring no more than is necessary to provide fair notice and an opportunity to be heard.*[74] *In other words, in some cases a hearing is not required; a meeting between the students involved and college administrators suffices, as long as accused students are informed of the charges and given an opportunity to tell their side of the story.*

By contrast, larger schools may not want to require such an initial meeting because such meetings could consume all of the administrator's time with little benefit. Local experience will dictate whether it is effective to attempt to resolve alleged Student Code violations through such a meeting.

This Model Student Code advocates using a "more likely than not" or "preponderance of the evidence" standard for disciplinary

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[69] *See, e.g.*, Kusnir v. Leach, 64 Pa. Commw. 65, 71-72, 439 A.2d 223, 226-27 (1982).

[70] Gabrilowitz v. Newman, 582 F.2d 100, 106 (1st Cir. 1978).

[71] *Id.*

[72] *See* Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987) (accused students' ability to submit questions to the disciplinary board, to be asked of the witnesses, held sufficient); Wimmer v. Lehman, 705 F.2d 1402, 1406 (4th Cir. 1983); University of Houston v. Sabeti, 676 S.W.2d 685, 689 (Tex. Ct. App. 1984); Hart v. Ferris State College, 557 F. Supp. 1379, 1386-87 (W.D. Mich. 1983) (probable value of cross-examination by student's counsel is minimal compared to significant burden it would impose); Gorman v. University of R.I., 837 F.2d 7, 16 (1st Cir. 1988) (right to unlimited cross-examination not an essential requirement of due process). *But see* Speake v. Grantham, 317 F. Supp. 1253, 1258 (S.D. Miss.), *aff'd per curiam*, 440 F.2d 1351 (5th Cir. 1971); Dillon v. Pulaski County Special School Dist., 468 F. Supp. 54, 58 (E.D. Ark.), *aff'd*, 594 F.2d 699 (8th Cir. 1979); Keene v. Rodgers, 316 F. Supp. 217, 221 (D. Me. 1970) (student has right to confront and cross-examine witnesses against him or her).

[73] *See, e.g.*, Office of Student Affairs, Westminster College, *Student Handbook Bulletin 1989-90* at 15 (detailing a required pre-hearing conference, at which a student may request an administrative hearing rather than a hearing before the College Judicial Board).

[74] Mathews v. Eldridge, 424 U.S. 319, 348-49, 96 S. Ct. 893, 909 (1976); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 71 S. Ct. 624 (1951) (Frankfurter, J., concurring); Henson v. Honor Comm. of Univ. of Va., 719 F.2d 69, 74 (4th Cir. 1983).

decisionmaking. This is because the "beyond a reasonable doubt" standard applied in criminal cases is too demanding for college disciplinary proceedings.[75] Courts review disciplinary decisions of colleges or universities under a "substantial evidence" standard. In doing so, courts generally examine whether there was enough evidence at the hearing to demonstrate that it was "more likely than not" that the accused student violated the Student Code, or whether a "preponderance of the evidence" demonstrated such violation—the same standard applied in most civil cases.[76] Some codes use a "clear and convincing" standard, but such a standard is not common.[77]

5. There shall be a single verbatim record, such as a tape recording, of all hearings before a judicial body. The record shall be the property of the [College] [University].

Commentary. The purpose of this provision is twofold. First, it assures all parties that a record will be made of the hearing.[78] Second, it establishes that such record is the property of the institution.

In some cases, a student may request permission to make a record of the proceedings.[79] An institution may not wish to permit a student to do so because, for example, it may not want its students replaying tapes of college disciplinary proceedings as a form of entertainment. The college or university may grant student requests to make a record of the proceeding if it wishes, perhaps on the condition that the tape nevertheless become the school's property and not be removed from its control. In any event, a provision requiring that a record be kept can shield the institution from liability should it refuse the student's request.[80]

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[75] Sill v. Pennsylvania State Univ., 462 F.2d 463, 467 (3d Cir. 1972); *Speake*, 317 F. Supp. at 1281-82; Jones v. State Bd. of Educ., 407 F.2d 834, 836 (6th Cir. 1969); *Keene*, 316 F. Supp. at 221; *Esteban*, 415 F.2d 1077, 1088-90 (8th Cir. 1969). *But see* Smyth v. Lubbers, 398 F. Supp. 777, 797-99 (W.D. Mich. 1975) (recommending use of a "clear and convincing" standard and ruling that a "substantial evidence" standard was constitutionally inadequate in a case involving an alleged violation of a student code which would also constitute a crime); Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J.C.U.L. 71 (1985) (advocating use of a "clear and convincing" standard).

[76] *See infra* notes 90-92 and accompanying text.

[77] *See supra* note 75.

[78] At least one court has required that a transcript be made of student disciplinary hearings. *See* Marin v. University of P.R., 377 F. Supp. 613, 623 (D.P.R. 1973).

[79] *See, e.g.*, Gorman v. University of R.I., 837 F.2d 7 (1st Cir. 1988).

[80] *See, e.g.*, *Gorman*, 837 F.2d at 16 (record of proceedings required by university manual constituted a sufficient record so that denial of student's request to tape-record the hearing was not so unfair as to violate due process).

6. Except in the case of a student charged with failing to obey the summons of a judicial body or [College] [University] official, no student may be found to have violated the Student Code solely because the student failed to appear before a judicial body. In all cases, the evidence in support of the charges shall be presented and considered.

Commentary. "Judgment by default" is a rather harsh penalty to impose upon a student accused of violating the disciplinary code. It is also a good way to ask for a lawsuit.

B. Sanctions

1. The following sanctions may be imposed upon any student found to have violated the Student Code:
   a. Warning—A notice in writing to the student that the student is violating or has violated institutional regulations.
   b. Probation—A written reprimand for violation of specified regulations. Probation is for a designated period of time and includes the probability of more severe disciplinary sanctions if the student is found to be violating any institutional regulation(s) during the probationary period.
   c. Loss of Privileges—Denial of specified privileges for a designated period of time.
   d. Fines—Previously established and published fines may be imposed.
   e. Restitution—Compensation for loss, damage or injury. This may take the form of appropriate service and/or monetary or material replacement.
   f. Discretionary Sanctions—Work assignments, service to the [College] [University] or other related discretionary assignments (such assignments must have the prior approval of the Judicial Advisor).
   g. Residence Hall Suspension—Separation of the student from the residence halls for a definite period of time, after which the student is eligible to return. Conditions for readmission may be specified.
   h. Residence Hall Expulsion—Permanent separation of the student from the residence halls.
   i. [College] [University] Suspension—Separation of the student from the [College] [University] for a definite period of time, after which the student is eligible to return. Conditions for readmission may be specified.
   j. [College] [University] Expulsion—Permanent separation of the student from the [College] [University].[81]

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[81] A student who is expelled or suspended may ask a court to enjoin the discipline.

Commentary. Colleges and universities may, within certain limitations,[82] *authorize as many types of sanctions as they wish. This section gives the institution maximum flexibility by permitting the Judicial Advisor to impose any sanction for any infraction of the Student Code. An alternative approach is to enumerate those offenses carrying the more serious sanctions (i.e., expulsion and suspension), and to allow the Judicial Advisor to choose among the remaining sanctions in punishing other offenses.*[83]

2. **More than one of the sanctions listed above may be imposed for any single violation.**
3. **Other than [College] [University] expulsion, disciplinary sanctions shall not be made part of the student's permanent academic record, but shall become part of the student's confidential record. Upon graduation, the student's confidential record may be expunged of disciplinary actions other than residence-hall expulsion, [College] [University] suspension or [College] [University] expulsion, upon application to the Judicial Advisor. Cases involving the imposition of sanctions other than residence-hall expulsion, [College] [University] suspension or [College] [University] expulsion shall be expunged from the student's confidential record [insert preferred number] years after final disposition of the case.**

Commentary. The maintenance of student records is regulated by the Buckley Amendment.[84] *The Buckley Amendment does not mandate that records of disciplinary action be treated as this section provides, but if a college or university already has a policy concerning such records, school officials may wish to incorporate that policy into the Student Code. Drafters of student codes should investigate their own state's laws to determine whether any privacy acts affect this issue.*[85] *When determining the institution's preferred*

Courts have held that suspension does not constitute irreparable harm so as to support a motion for injunctive relief. Boehm v. University of Pa. School of Veterinary Medicine, 392 Pa. Super. 502 573 A.2d 575 (1990); *Schulman*, 371 Pa. Super. 345, 538 A.2d 49, 51-52. *But see Dartmouth Review*, slip op. at 24; Jones v. Board of Governors, 557 F. Supp. 263 (W.D.N.C.), *aff'd* 704 F.2d 713 (4th Cir. 1983); McLaughlin v. Massachusetts Maritime Academy, 564 F. Supp. 809, 811 (D. Mass. 1983); Gardenshire v. Chalmers, 326 F. Supp. 1200, 1202 (D. Kan. 1971); Stricklin v. Regents of Univ. of Wis., 297 F. Supp. 416, 422 (W.D. Wis. 1968).

[82] The district court in *Gorman*, for example, found that the University of Rhode Island's sanction of compulsory psychiatric treatment was a "shocking extreme" and would violate the student's right to privacy. 646 F. Supp. 799, 814.

[83] *See, e.g.*, Pavela, *Limiting the "Pursuit of Perfect Justice" on Campus: A Proposed Code of Student Conduct*, 6 J.C.U.L. 137, 143 (1979).

[84] Family Educational Rights and Privacy Act of 1974, Title V, § 513, 88 Stat. 484, 571-574 (20 U.S.C. § 1232g); as further amended by Pub. L. No. 93-568, § 2, 88 Stat. 1855, 1858-1862 (20 U.S.C. § 1232g).

[85] *Cf.* Cloud v. Trustees of Boston Univ., 720 F.2d 721, 726 (1st Cir. 1983).

course of action, student-code drafters should realize that disclosure of severe disciplinary actions could affect the student's ability to enter other institutions.[86] *This would occur only if such news "imposed on [the student] a stigma or other disability that foreclosed his freedom to take advantage of other . . . opportunities."*[87] *Whether any sanction short of expulsion should appear on an academic transcript and, even then, whether the reason for expulsion should appear, are issues meriting careful consideration.*

4. The following sanctions may be imposed upon groups or organizations:
   a. Those sanctions listed above in Section B 1, a through e.
   b. Deactivation—Loss of all privileges, including [College] [University] recognition, for a specified period of time.

Commentary. When a student organization engages in some act of misconduct, the college or university may take action not only against the student(s) involved, but also against the organization itself. This procedure does not violate the double jeopardy clause of the Constitution[88] *for two reasons. First, the double jeopardy clause applies only to criminal, not civil, proceedings.*[89] *Proceedings under a school's Student Code are not criminal proceedings.*[90] *Furthermore, the actors (student(s) and organization) are separate offenders. Punishing each of them for the same act is not punishing the same offender twice for one act of misconduct.*[91] *Similarly, it does not violate the double jeopardy clause for the same student*

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[86] *Cf.* Bishop v. Wood, 426 U.S. 341, 349-50, 96 S. Ct. 2074, 2079-80 (1976); Board of Regents v. Roth, 408 U.S. 564, 575, 92 S. Ct. 2701, 2708 (1972). *See, e.g.*, Greenhill v. Bailey, 519 F.2d 57 (8th Cir. 1975) (school notifying Association of American Medical Colleges that it had dismissed student for poor academic standing due to "[l]ack of intellectual ability or insufficient preparation" deprived student of liberty interest in attending other schools).

[87] *Roth*, 408 U.S. 564, 573, 92 S. Ct. 2701, 2707 (1972).

[88] The fifth amendment to the United States Constitution provides in part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. This provision applies to the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062 (1969).

[89] Paine v. Board of Regents, 355 F. Supp. 199, 203 (W.D. Tex) *aff'd*, 474 F.2d 1397 (5th Cir. 1973). *Cf.* Oliver v. United States Dept. of Justice, 517 F.2d 426, 428 (2d Cir. 1975) (deportation proceedings following a criminal conviction do not violate double jeopardy clause); United States v. Forty-Two Jars "Bee Royale Capsules," 160 F. Supp. 818, 821 (D.N.J. 1958) (double jeopardy does not apply to drug misbranding proceedings); Attorney Grievance Comm. v. Andresen, 281 Md. 152, 379 A.2d 159, 160 (1977) (double jeopardy clause does not apply to attorney disciplinary proceedings). *See also* Thomas, *An Elegant Theory of Double Jeopardy*, 4 U. ILL. L. REV. 827, 837 (1988).

[90] See, e.g., Nzuve v. Castleton State College, 335 A.2d 321, 323 (Vt. 1975).

[91] *Cf.* United States v. Richmond, 700 F.2d 1183, 1195 n.7 (8th Cir. 1983) (punishment of both a corporation and its officers does not constitute double punishment).

to be subjected to both criminal and student-code (civil) sanctions for the same misconduct.[92]

5. In each case in which a judicial body determines that a student has violated the Student Code, the sanction(s) shall be determined and imposed by the Judicial Advisor. In cases in which persons other than or in addition to the Judicial Advisor have been authorized to serve as the judicial body, the recommendation of all members of the judicial body shall be considered by the Judicial Advisor in determining and imposing sanctions. The Judicial Advisor is not limited to sanctions recommended by members of the judicial body. Following the hearing, the judicial body and the Judicial Advisor shall advise the accused in writing of its determination and of the sanction(s) imposed, if any.

Commentary. Imposition of sanctions by the Judicial Advisor ensures some consistency among the sanctions meted out over time. A college or university may choose to allow students, rather than a college or university official, to impose sanctions in each case.[93] *Such a choice is not unusual. It may be more equitable, however, to have the Judicial Advisor choose the punishment in all situations, so as to avoid putting students who sit on the judicial body in the awkward position of imposing a harsh punishment on a peer.*

C. Interim Suspension

In certain circumstances, the [title of administrator identified in Article I, number 13], or a designee, may impose a [College] [University] or residence-hall suspension prior to the hearing before a judicial body.

1. Interim suspension may be imposed only: a) to ensure the safety and well-being of members of the [College] [University] community or preservation of [College] [University] property; b) to ensure the student's own physical or emotional safety and well-being; or c) if the student poses a definite threat of disruption of or interference with the normal operations of the [College] [University].
2. During the interim suspension, students shall be denied access to the residence halls and/or to the campus (including classes) and/

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[92] *See Paine*, 355 F. Supp. at 203.

[93] *See, e.g.*, Section VII, Northwestern University Offenses and Hearing Procedures (available from NACUA) (providing that a hearing board comprised of students and faculty will determine and impose sanctions). By way of further contrast, it should be noted that the University of Virginia's Honor Code provides for only one possible sanction—that of expulsion—for any violation. University of Virginia Honor Committee Constitution Art. II (July 1986). In light of this severe, mandated sanction, the system utilizes a "beyond a reasonable doubt" standard. *"On my honor. . .": Philosophy and Guidelines of the Honor System*, University of Virginia (1988).

or all other [College] [University] activities or privileges for which the student might otherwise be eligible, as the [title of administrator identified in Article I, number 13] or the Judicial Advisor may determine to be appropriate.

Commentary. It is permissible to impose an interim suspension in certain instances.[94] *The requisite notice and hearing process, however, should follow as soon as is practicable.*[95]

D. Appeals

1. A decision reached by the judicial body or a sanction imposed by the Judicial Advisor may be appealed by accused students or complainants to an Appellate Board within five (5) school days of the decision. Such appeals shall be in writing and shall be delivered to the Judicial Advisor or his or her designee.

Commentary. This is another point at which it may be wise to grant students more rights than they might otherwise have. Although there is some authority for the proposition that students need not be given the right to appeal from a decision rendered as a result of a hearing,[96] *providing an appellate process promotes an image of fairness. Further enhancing the image of fairness, this model affords not only the accused student but also the complainant a right to appeal. Particulars, such as the amount of time within which to permit appeals, may vary from school to school.*

2. Except as required to explain the basis of new evidence, an appeal shall be limited to review of the verbatim record of the initial hearing and supporting documents for one or more of the following purposes:

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[94] This concept stems from a passage in Goss v. Lopez, 419 U.S. 565, 582-83, 95 S. Ct. 729, 740-41, which provides that "[s]tudents whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and . . . hearing should follow as soon as practicable." In Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487 (1985), however, the Supreme Court indicated that in most cases an interim suspension without some sort of hearing beforehand is something to be avoided if possible. *Loudermill* was not a school case, but it indicated that, at least in the public employment context, a pretermination hearing serves as "an initial check against mistaken decisions." *Id.* at 545, 105 S. Ct. at 1495.

[95] Goss, 419 U.S. at 582-83, 95 S. Ct. at 740. *See* Picozzi, *supra* note 52, at 2158 n.111, in which the author indicates that judgments of whether the imminent danger necessary to justify an interim suspension is present should be left to the discretion of the administrator responsible for implementing the student code but that the administrator's decision should be reviewed as soon thereafter as is practicable.

[96] *See* Nash v. Auburn Univ., 621 F. Supp. 948, 957 (M.D. Ala.), *aff'd*, 812 F.2d 655 (11th Cir. 1987).

a. To determine whether the original hearing was conducted fairly in light of the charges and evidence presented, and in conformity with prescribed procedures giving the complaining party a reasonable opportunity to prepare and present evidence that the Student Code was violated, and giving the accused student a reasonable opportunity to prepare and to present a rebuttal of those allegations.
b. To determine whether the decision reached regarding the accused student was based on substantial evidence, that is, whether the facts in the case were sufficient to establish that a violation of the Student Code occurred.
c. To determine whether the sanction(s) imposed were appropriate for the violation of the Student Code which the student was found to have committed.
d. To consider new evidence, sufficient to alter a decision, or other relevant facts not brought out in the original hearing, because such evidence and/or facts were not known to the person appealing at the time of the original hearing.

Commentary. The appellate body should review the hearing board's decision in order to determine whether it was supported by substantial evidence.[97] *Substantial evidence is "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"*[98] *In making such a determination, the Appellate Board should not substitute its judgment for the judgment of the judicial body. Instead, it should review the judicial body's determination only to see whether there was evidence before the judicial body which supported the result reached below.*[99]

3. If an appeal is upheld by the Appellate Board, the matter shall be remanded to the original judicial body and Judicial Advisor for re-opening of the hearing to allow reconsideration of the original determination and/or sanction(s).

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[97] Speake v. Grantham, 317 F. Supp. 1253, 1282 (S.D. Miss. 1971); Jones v. State Bd. of Educ., 407 F.2d 834, 836 (6th Cir. 1969); Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972); Herman v. University of S.C., 341 F. Supp. 226, 231 (D.S.C. 1971), *aff'd per curiam*, 457 F.2d 902 (4th Cir. 1972); Center for Participant Educ. v. Marshall, 337 F. Supp. 126, 136 (N.D. Fla. 1972). *See also* Note, *supra* note 17, at 379-80. *But see* Smyth v. Lubbers, 398 F. Supp. 777 (W.D. Mich. 1975) (applying an original, not appellate, standard of proof of clear and convincing evidence); McDonald v. Board of Trustees, 375 F. Supp. 95, 103-04 (N.D. Ill. 1974), *aff'd*, 503 F.2d 105 (7th Cir. 1974); Long, *supra* note 75, at 81.

[98] Sill v. Pennsylvania State Univ., 318 F. Supp. 608, 621 (M.D. Pa.), *aff'd*, 462 F.2d 463 (3d Cir. 1972), (*citing* Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 S. Ct. 456 (1951)).

[99] *Cf.* Mullins v. Secretary of Health & Human Services, 680 F.2d 472 (6th Cir. 1982).

Commentary. A smaller institution may wish to permit yet another step in the appeal process by providing that a person disagreeing with the decision of the Appellate Board may appeal to the president or other top-ranking official. In such cases, the institution may want to provide that the decision of the president shall be "final and binding."[100] *Doing so would open the door to arguing that, as in labor disputes in which the parties have agreed that disputes be submitted to binding arbitration, the decision of the president as "arbitrator" should not be disturbed by a court as long as it is reasonable and derives its essence from the student code.*[101]

4. In cases involving appeals by students accused of violating the Student Code, review of the sanction by the Appellate Board may not result in more severe sanction(s) for the accused student. Instead, following an appeal, the [title of administrator identified in Article I, number 13] may, upon review of the case, reduce, but not increase, the sanctions imposed by the Judicial Advisor.

Commentary. Providing that an appeal may result in decreased, but not increased, sanctions ensures that accused students will feel free to exercise their rights of appeal. Students may be deterred from appealing if they fear that sanctions may be increased as a result. Granting a right of appeal under conditions which actually deter such appeals only serves to lessen the perception of fairness in the process.

5. In cases involving appeals by persons other than students accused of violating the Student Code, the [title of administrator identified in Article I, number 13] may, upon review of the case, reduce or increase the sanctions imposed by the Judicial Advisor or remand the case to the original judicial body and Judicial Advisor.

Commentary. To grant a complaining student a right of appeal would be of little value without this provision. In cases in which a complaining student appeals a decision in which no violation was found, this provision is not necessary. In cases in which a complaining student is appealing only the sanction imposed against a student found to have violated the student code, however, the complaining student presumably believes that a stiffer sanction

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[100] *See, e.g.*, Compass, 1989 Student Handbook of Allegheny College, Judicial System Art. VI, § 2 at p. 85.

[101] *See, e.g.*, Baker v. Lafayette College, 516 Pa. 291, 299-300, 532 A.2d 399, 403 (1987). *See generally* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 108 S. Ct. 364 (1987); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 80 S. Ct. 1358 (1960).

should be imposed.

In most cases in which the administrator believes that the appeal of a person other than the accused student should be granted, the remedy should be to remand the case to the original judicial body and Judicial Advisor. That body or person may further consider the evidence and either render a new decision or better explain the basis for the original decision.

ARTICLE V: INTERPRETATION AND REVISION

A. Any question of interpretation regarding the Student Code shall be referred to the [title of administrator identified in Article I, number 13] or his or her designee for final determination.

B. The Student Code shall be reviewed every [——] years under the direction of the Judicial Advisor.

Commentary. Every Student Code should be reviewed periodically, at least every three years. Specifying some "normal" period for review may help ensure that such a review is done.

THE UNIVERSITY OF MICHIGAN'S STATEMENT OF STUDENT RIGHTS AND RESPONSIBILITIES

Ann Arbor Campus

Preamble

The University of Michigan is dedicated to creating a scholarly community that promotes intellectual inquiry, encourages vigorous discourse, and respects individual freedom and dignity. Civility, diversity of opinion, and freedom of expression are all valued as the necessary foundation for a healthy learning community. All students are welcome members of this community and are expected to participate in sustaining its values.

The University of Michigan and its students are committed to maintaining an inclusive, academically centered community. The goals of this community include creating an environment that supports learning, protects the freedoms guaranteed by the United States Constitution, and assures members of the University community a safe environment free from violence, intimidation, fraud, theft, and harassment. The responsibility for reaching these goals lies with each member of this academic community.

The purposes of this statement are to define students' basic rights within the University community and what students may expect of the University and to explain the academic community's expectations of its student members, including the standard by which student behavior is measured. This statement describes unacceptable student behavior and creates procedures to sanction students if they engage in such unacceptable conduct.

It is the University's goal that all members of the University community adhere to a set of fundamental and ethical standards similar to those that follow for students. The manner in which each group may carry out such standards will vary depending on the rules and procedures established.

Section I: Scope of the Statement

This statement does not:

- apply to issues of academic integrity or professional conduct covered by school or college rules: it does not apply if the school or college chooses to employ its rules and procedures to process a case.
- cover the policies or practices of student organizations; it applies only to the actions of individual students.
- apply to non-violent civil disobedience or student protest. Federal, state, and local laws may be enforced against student demonstrators, but the University will not pursue sanctions under this policy against students for non-violent demonstrations.
- apply to speech that is protected by the First Amendment.
- apply to student publications or to students responsible for writing, creating, or publishing the material contained in such publications while they are acting within the scope of their journalistic responsibilities.
- limit the ability of the University to employ administrative actions (hold credits, library fines, etc.).

Section II: Expectation of Students

Students accept the rights and responsibilities of membership in the University of Michigan's academic and social community when they are admitted to the University. Honesty in academic work is expected of each student at the University of Michigan. Allegations of academic dishonesty are reported to and handled by the schools and colleges. Each student is expected to respect the rights of others and to work to create an open, intellectually stimulating environment where diversity of ideas is valued and every person's dignity and autonomy is respected.

Section III: Students' Rights and the University's Responsibilities

Students at the University of Michigan have the same rights and protections under the constitutions of the United States and the state of Michigan as other citizens. These rights include freedom of expression, press, religion, and assembly. Freedom of expression, including dissent and voicing unpopular views, is a valued tradition at the University of Michigan, where students have a long tradition of activism. As members of this community, students have the right to express their own views, but must also take responsibility for according the same right to others.

Students also have the right to be treated fairly by the University and to be informed of University policies affecting them. Any student accused of violating this policy is entitled to procedural due process protections.

A. The University is committed to protecting students' rights of association

Students are free to organize and join associations to promote their common interests.

B. The University is committed to protecting students' rights of inquiry and expression

Students are free to examine and discuss all questions of interest to them and to express opinions publicly and privately.

The University's commitment to freedom of expression and inquiry has been described in detail in the "Statement on Freedom of Speech and Artistic Expression: The Rights and Obligations of Speakers, Performers, Audience Members, and Protesters at the University of Michigan," approved by the Board of Regents in July 1988. Members of the University community, speakers, artists, and others invited by members of the University community have the right to set forth their views and opinions at the University. Within its lawful authority to do so, the University will protect the right of any member of the University community or any invited speaker or artists to speak or perform. The University will also protect the rights of those members of the University community who wish to hear and communicate with an invited speaker or artist.

C. The University is committed to protecting students' rights to a free press

The University will not restrict the editorial freedom of student publications and the student press.

D. The University is committed to protecting students' rights to due process

Students who have been accused of violating University policies have the right to fair treatment. Students, under this policy, have the right to:

1. be informed, in writing, of the charges against them with sufficient particularity and time to insure opportunity to prepare for a hearing.
2. decline to make self-incriminating statements or to participate in a hearing. Such action will not be interpreted as evidence of guilt, but the process and the hearing will still go forward.
3. decline to appear at the hearing, which will not be interpreted as evidence of guilt, with the understanding that the process and the hearing will still go forward. The judicial advisor will attempt to set hearing times and dates that are mutually acceptable to the parties.
4. present information on their own behalf, including oral and written statements, physical exhibits, and witnesses.
5. require the testimony of any member of the University community who has direct knowledge of the incident; unless the Judicial Advisor determines that the testimony would be irrelevant, immaterial, or redundant or would violate a legal privilege.
6. hear all information presented and to question all people who appear before the hearing committee.
7. be advised by an advisor or attorney for consultation purposes during the hearing.
8. an opportunity to challenge the objectivity of the hearing officer or the panel.
9. have the burden of proof rest upon those bringing the charge.
10. receive a timely written decision.
11. confidentiality as provided by the Family Education Rights and Privacy Act.
12. have a recording made of the hearing.
13. an appeal or review of the original hearing.
14. an open hearing, providing the accused requests an open hearing and either:
    - (a) the complainant consents, or
    - (b) the complainant is not a student and the complaint does not allege sexual assault or harassment, or
    - (c) the judicial advisor, in consultation with the General Counsel's office, determines that no substantial harm will result to the complainant as a result of an open hearing.

Section IV: Students' Responsibilities

Students at the University of Michigan expect members of their community to be responsible for their actions and to respect the rights of others. These expectations are not meant to limit students' constitutional right to freedom of expression.

A. Actions on campus

The following personal actions on University property or at official University functions are prohibited by this policy:

1. Sexual assault and rape
2. Harassment, defined as physical force or violence; or behavior, including stalking, that involves a deliberate interference or a deliberate threat to interfere with an individual's personal safety, academic efforts, employment, or participation in university sponsored activities and causes the person to have a reasonable apprehension that such harm is about to occur. Students may not use threats concerning the terms or conditions of an individual's education, employment, housing, or participation in a University activity as a way to gain sex and/or sexual favors.
3. Physical assault, battery, or endangerment of any person
4. The knowing possession, use, or storage of firearms or dangerous weapons, except for authorized academic or employment purposes or in connection with a registered student activity or organization
5. Hazing practices as requirements of membership, advancement, or continued good standing in organizations, defined as including the following willful acts, with or without the consent of the individual involved:
    - physical injury, assault, or battery
    - kidnapping or imprisonment
    - intentionally placing at risk of severe mental or emotional harm
    - degradation, humiliation, or compromising of moral or religious values
    - forced consumption of any liquid or solid
    - mandatory personal servitude
    - placing an individual in physical danger (at risk) which includes abandonment
    - impairment of physical liberties which include curfews or other interference with academic endeavors
6. Unlawful possession, use, manufacture, sale, or distribution of alcohol or other drugs
7. Arson; unauthorized setting of fires, unauthorized tampering with any fire alarms or fire safety systems
8. Fraud against the University, forgery, misuse, or alteration of any university document or record, misuse of the University's computer system to gain access to restricted information, or knowingly furnishing false information to the University
9. Unauthorized taking or possession of property or services of another
10. Intentionally and significantly interfering with teaching
11. Damage or destruction of property belonging to another
12. Illegal entry into University facilities
13. Making a false report concerning a fire, bomb, or other emergency
14. Misuse of the disciplinary procedures, including
    - (a) failure to respond to the request for an interview by the judicial officer during the investigation of a violation (students, including an accused student, may choose not to appear and present testimony at a hearing after a meeting with the judicial advisor)

- (b) knowingly falsifying or misrepresenting information before a hearing body
- (c) disruption or interference with the orderly conduct of a hearing
- (d) knowingly making a false accusation
- (e) attempting to influence the impartiality of a member of a hearing body prior to, and/or during the course of, a hearing
- (f) harassment and/or intimidation of a member of a hearing body or of a witness prior to, during and/or after a disciplinary proceeding
- (g) failure to comply with the sanction(s) imposed by the hearing body
- (h) influencing or attempting to influence another person to present false information or a false complaint

B. Actions off campus

While the conduct of students on campus is of concern to members of the academic community, student actions off campus may also negatively affect the security of the community and/or the integrity of the educational process. The University has differentiated these by the nexus to the institution and the egregiousness of the violation. While all illegal conduct by students is abhorrent to the University, the ability to gather evidence, including testimony of witnesses, limits the institution from pursuing most violations which occur at a distance from the University.

1. The following actions committed off campus will result in a challenge through the student judicial system if they occur in Ann Arbor or its environs (within 30 miles of campus):

- (a) illegal sale, distribution, or manufacture of drugs
- (b) physical assault, battery, and endangerment
- (c) murder
- (d) arson
- (e) hazing
- (f) sexual assault and/or rape
- (g) harassment

2. The same actions listed in IV B. 1 may be challenged through the University judicial system regardless of where they occur if a student has been convicted of the offense in a court of law. The University hearing body must decide if the violation poses a clear threat to the mission of the University or to the health and safety of its members.

Section V: Regents' Bylaw 2.01

The Board of Regents of the University of Michigan in Regents' Bylaw 2.01 has given the President of the University the authority for "the maintenance of health, diligence, and order among the students." In cases in which student behavior interferes with the University's ability to maintain those conditions, the President, working through designated University officials, normally will refer a student case to the hearing procedures outlined in the procedures section of this document.

PROCEDURES FOR RESPONDING TO VIOLATION OF THESE STANDARDS

I. Purposes of the Procedures

These standards and procedures have been established by the University to protect its educational purpose, to provide for the orderly conduct of its activities, to protect the victims of crime, and to safeguard the interests of the University community. These disciplinary procedures used by the University are considered part of its educational process and reflect the philosophy of peer education and evaluation. Hearings or appeals conducted as a part of this process are not courts of law and they are not subject to many of the rules of civil or criminal hearings. Because some of the violations of these standards are also violations of law, students may be accountable to both civil authorities and to the University for their actions. Disciplinary action at the University will normally proceed not withstanding any civil or criminal proceeding.

II. Emergency Suspension

If a student's actions indicate that his or her continued presence on campus or participation in University activities poses an imminent danger to persons or property, the Vice President for Student Affairs may take emergency action through an immediate suspension. Before, or within 24 hours after, such emergency suspension is imposed, the student shall be given an opportunity to appear before a designee of the Vice President for Student Affairs. At such time the student may make a statement and present evidence bearing on the alleged violation. If the emergency suspension is continued, the student is entitled to a formal hearing within seven (7) calendar days or as soon as practicable after the accused student is prepared to participate in a hearing.

III. Filing Complaints, Notice and Investigation

A. Filing a complaint

Individuals are encouraged to file complaints when they believe there has been a violation of this policy. The formal mechanisms are designed to afford due process protection to the individuals involved, including time to prepare statements, but also resolve cases in a timely manner.

Those filing complaints under these standards should contact the Office of the Vice President for Student Affairs, in the Fleming Building. A judicial advisor, located within the Office of the Vice President for Student Affairs, administers the procedures and guidelines of these standards. The judicial advisor will consult the Office of the General Counsel regarding such complaints.

All complaints must be filed within six months of the date of the violation or the discovery of the violation.

B. Notice and Investigation

The judicial advisor will make written notification within ten (10) working days after the filing of the complaint, as well as provide the accused with a complete copy of the complaint. All records and documents to be presented to the hearing committee will be made available to both the accused and complainant.

The judicial advisor will conduct a preliminary investigation to determine if there is sufficient evidence to proceed with mediation or a formal hearing. Such a review ordinarily will involve interviewing any complaining witnesses and the accused, as well as other necessary witnesses. If the judicial advisor determines there is enough evidence for a hearing committee to find a violation of the policy, a formal hearing process or mediation will be initiated.

If the judicial advisor determines there is insufficient evidence that a violation has occurred, both the accused and the individual filing the complaint will be notified in writing.

When a serious violation has been reported and it appears that a member of the University community is in serious and continuing danger, the judicial advisor will move the case ahead of others to insure a timely hearing.

IV. Mediation

The University believes a strong system of mediation of disputes will encourage reporting and resolution of complaints. Mediation is appropriate when all parties involved (accuser(s) and accused) voluntarily agree to engage in the mediation process. Mediation will involve resolution of the incident, including sanctioning when needed. If mediation fails, the case will be forwarded for a formal hearing.

To ensure these standards are applied with a proper regard to their goals and purposes, such mediation will occur solely through or at the direction of the office of the judicial advisor. Other academic and administrative offices may provide counseling and support for students. These offices include Counseling Services, Multicultural Student Programming, the Ombudsman, the Center for the Education of Women, the Sexual Assault Prevention and Awareness Center, the Department of Public Safety, Services for Students with Disabilities, the Lesbian and Gay Male Programs Office, and faculty and staff within the schools and colleges.

V. Formal Hearing

The hearing board will consist of six students. At the beginning of each academic year, students will be randomly selected from the student body to serve as potential hearing panelists until a pool of 50 eligible students is obtained. Selected students may be excused by the judicial advisor if service could cause undue hardship. The hearing will be chaired by a faculty or staff member drawn from a panel selected by the Student Relations Committee of Senate Advisory Committee on University Affairs. The chair conducts the hearing and is a non-voting member of the committee. The chair selects a hearing committee by lot from the eligible pool of panelists. The judicial advisor shall provide appropriate training for the faculty and student panel in due process and questioning techniques prior to being assigned to a hearing committee.

The chair shall ensure that panelists are both dedicated to their duty as well as unbiased. The chair's selections may be reviewed by both the complainant and the accused. The complainant or the accused may challenge a committee member or the chair based on bias or other cause. The committee member shall be disqualified if the chair determines that the challenge is justified. The chair shall be disqualified if the Vice President for Student Affairs determines that the challenge is justified.

The chair may consult with the General Counsel's office before, during, and after the hearing regarding procedural matters. The judicial advisor is responsible for sending the complete report of the investigation to the hearing committee, and may be called as a witness. The accused retains the right to confront all witnesses and the accused, complainant, and panelists may question witnesses. Either the complainant or the accused may offer sworn affidavits to the panel for consideration. Both parties may be accompanied and counseled by an advisor of their choice who will be permitted to attend, but not participate in, the proceedings. The following are exceptions to this rule:

A. In cases where the accused student is physically incapable of being present at a hearing, he/she may be represented during the hearing by a member of the University community.

B. Students with communication disorders may have a member of the University community speak for them.

The accused must be informed of his or her right to remain silent, and may not be compelled to be a witness against himself or herself. Committee deliberations will be in private. The chair will communicate in writing the results of the hearing to the accused and to the complainant. The letter communicating the results of the hearing will include a separate finding of facts in the case and how the facts were applied.

If all members of the committee determine, by clear and convincing evidence, that the accused student has violated the policy, they will come to consensus on an appropriate sanction. The finding and sanction of the hearing committee will be communicated to the Vice President for Student Affairs who will enforce the sanctions.

VI. Alternate Hearing Process

The accused student may waive a full board hearing and request an administrative hearing. These hearings are conducted by hearing officers appointed by the Vice President for Student Affairs. Administrative hearings will be used during the summer when student board members and faculty chairs are unavailable. An accused student has the option of delaying his or her hearing until the fall term, unless delaying the hearing causes imminent danger to persons or property.

VII. Appeals

A. Procedure

If the accused student disputes the finding of the hearing committee or the administrative hearing officer, or the recommended sanction, he or she may appeal the decision. Such an appeal must be submitted in writing to the Vice President for Student Affairs within ten (10) class days after the notice of the decision of the hearing panel. Upon petition, this time line may be extended. The appeal statement should contain the grounds for the appeal. Appeals will be limited to a review of the record of the hearing, written statements submitted by parties and any new evidence. The Vice President will forward the student's letter of appeal and all records of the investigation and hearing to the appeals board. The student may challenge any member of the appeals board for bias. The board member shall be disqualified if the Vice President for Student Affairs determines that the challenge is justified.

B. Grounds

Grounds for the appeal are limited to:

1. the procedures described in this policy were not followed
2. the decision was not supported by the evidence presented at the hearing
3. the sanction was not appropriate for the violation
4. new evidence is available that was not reasonably available at the time of the hearing.

C. Appeals Board

The Appeals Board is composed of three members who are to serve for the academic year and hear all appeals. They are appointed as follows:

1. a student who is elected from and by the 50 students comprising the hearing panel
2. a faculty member who is appointed by SACUA
3. an administrator who is appointed by the President of the University.

Alternate members may be appointed to the Appeals Board as needed.

D. Decisions of Appeals Board

Decisions by the appeals board will be by majority vote. The appeals board must make a decision within ten (10) working days of receiving the appeal. It may take any of the following actions:

1. affirm the original decision concerning the violation of the policy
2. affirm the original decision concerning the disciplinary sanction imposed
3. reverse the original decision concerning the violation of the policy and direct that the complaint be dismissed
4. reverse the original decision concerning the violation of the policy and direct that a new hearing be held before a new hearing board
5. set aside the original decision concerning the sanction and impose a different sanction. The Appeals Board may not impose a greater sanction than the Hearing Committee.

The appeals board will notify the Vice President for Student Affairs in writing of its decision, who will communicate the decision to the student.

E. Further Appeals

The student who filed the appeal may not make any further appeal from this decision. An exception to this rule can be made when a student has been tried in a civil or criminal court for the incident which resulted in a campus hearing and has been found not guilty in criminal court or has a decision in his/her favor in civil court. In this situation, a student may petition for an appeal before an Appeals Board, regardless of earlier appeals or length of time since the hearing committee's decision.

VIII. Records

Detailed records will be maintained by the judicial advisor about any actions undertaken under the policy Accordingly, records will be maintained by the judicial officer of formal complaints, hearings, mediations, resolutions, findings, sanctions, and appeals. Two sets of records of these data will be maintained, an expunged version for public review and a confidential version for permanent records. Confidentiality of the records will be maintained to the extent required by law, including the Family Education Rights and Privacy Act. Records will be maintained in such as way that data on violations of this policy are easily available to the public. The judicial advisor will annually compile and release detailed statistics and examples of the administration and enforcement of the policy. However, some data may not be releasable if the identity of individuals involved would be revealed.

IX. Sanctions

Hearing panels should fashion sanctions commensurate with the offending conduct. Because education may be the most effective and appropriate means of addressing behavior that violates these standards in a University community, the University encourages hearing panels to design sanctions which include an educational element. One purpose of the sanctions is to help students understand their behavior in the context of this academic community. It is inappropriate for the University to try to change student's convictions; however, it remains appropriate for the University to ask a student to change behavior. Sanctions should be designed to deter the student from behaviors which harm, intimidate, harass, or threaten others. Regrettably, some conduct is so harmful to members of the University community or deleterious to the educational process that it requires more punitive sanctions. Hearing panels should impose such sanctions where appropriate.

Certain factors should be considered in fashioning the sanctions. These include the intent of the accused, the effect of the conduct on the victim and the University community, whether the student has violated the standards in the past, and whether sanctions such as education and community service are likely to change the student's conduct. The most severe sanctions, suspension from the University and expulsion, should be imposed only in very serious cases, including the willful failure to comply with a lesser sanction. The range of potential sanctions is as follows:

A. For any offense

1. Formal Reprimand: The individual receives a formal reprimand for violating the standards of behavior and a warning that future violations will be dealt with more harshly.
2. Community Service: The individual performs an appropriate amount of public service that is both beneficial to the community and likely to assist the individual in understanding the harm caused by his or her conduct.
3. Class Attendance: The individual enrolls in and completes a class that helps the person understand why the standards prohibit the conduct involved.
4. Restitution: The individual makes restitution to the victim for actual loss.

5. University Housing Transfer or Removal: The individual is transferred to a another room or housing unit, or is removed from University housing entirely. Additional policies identifying responsibilities of students living in University Housing are available in the document Guidelines for Community Living. The disciplinary process and sanctions described in that document may be applied as appropriate.

6. Suspension from Specific Courses or Activities: The individual is removed from a course or activity; or the individual is moved to a different section of a course.

7. Combined Sanctions: A combination of the sanctions described above may be imposed.

B. For offenses which are violent, dangerous, repeated, or a willful failure to comply with a lessor sanction

8. Suspension: The individual is suspended from the University for a defined period of time. When a student is suspended during a term, his or her tuition is forfeited. The Vice-President for Student Affairs shall consult with the dean, chair, or director in the unit in which the student is enrolled before suspension is imposed.

9. Expulsion: The individual is expelled from the University. When a student is expelled during a term, his or her tuition is forfeited. The Vice-President for Student Affairs shall consult with the dean, chair, or director in the unit in which the student is enrolled before expulsion is imposed.

The sanctions imposed under these standards do not diminish or replace the penalties available under generally applicable civil or criminal laws. Students are reminded that many violations of the standards, including harassment and other discriminatory behavior, may violate various state and federal laws.

X. Amendments

A. Proposal

Amendments to the Statement of Student Rights and Responsibilities can be proposed by the Michigan Student Assembly, SACUA, any Executive Officer of the University, by a petition sponsored by a student and signed by 500 currently enrolled students, or the faculty/student Panel. The judicial advisor shall bring all proposed amendments to the Panel for consideration.

B. Consideration by the Panel

All proposed amendments shall be considered and voted on by the Panel during the academic year. The Panel shall hold at least one public hearing on the proposed amendments. After the public hearing the Panel shall convene a meeting to determine by majority vote whether to approve a proposed amendment. The Panel may modify a proposed amendment at this time. During the public hearings and this meeting, at least 26 student panel members must be present. If less than 26 student members are present, no action may be taken. If the Panel votes to approve a proposed amendment it will be forwarded to the Board of Regents through the Vice President for Student Affairs.

C. Approval, Limitation and Exceptions

This is the only procedure by which faculty, staff, or students can make amendments to the Statement of Student Rights and Responsibilities not required by law. If an amendment is required by law, it can be unilaterally enacted by the Board of Regents. The Regents of the University of Michigan may reject any amendment approved by this procedure. The Regents may propose and enact amendments without following this procedure.

EFFORTS TO EDUCATE THE STUDENT COMMUNITY ON THEIR RIGHTS, RESPONSIBILITIES AND THESE STANDARDS

A. Education and Prevention

The prevention of behavior that violates these standards and the establishment of effective procedures with due concern for all parties require a thoughtful educational program.

1. The University will provide resources and time for the prevention of, and education about conduct that violates these standards. The University will provide information to deans, student affairs staff, chairs, and directors in each unit concerning: (a) student rights and responsibilities under this policy; (b) how complaints are filed; (c) summaries of cases; and (d) sources of support and information for victims and respondents.
2. Deans and heads of major administrative units are strongly encouraged to discuss these standards at meetings of faculty, staff, and teaching assistants. In addition, the deans and heads of major administrative units are urged to examine practices and behavior within their own units that may be inequitable or unjust to students.
3. Training programs for residential advisors, those who meet students in crisis situations, and others serving in an advising capacity to students, will include training about referrals, resources, and methods for handling conduct covered by this policy.
4. The Office of Student Affairs will develop an overall educational program for students dealing with issues covered in this statement and will provide information, definition, support, identification of resources, and exploration of behavioral alternatives. Educational programs will be directed toward, but not restricted to, new undergraduate and graduate/professional students.
5. The University will publish annually this statement and the procedures, including the resources available to advise, counsel, and assist in the mediation or reporting of violations of these standards. The information will explain how to utilize University-wide and school-specific resources.

B. Exit Interviews

The University will survey annually a sample of departing students to measure the existence and frequency of incidents that violate these standards, with a focus on violent or intimidating conduct, as well as survey all participants in the judicial system.

Effective: January 1, 1993

YALE UNIVERSITY
Undergraduate Regulations, 1992-1993

I. GENERAL CONDUCT AND DISCIPLINE

Yale College is an academic community dedicated to the advancement of learning. Its members freely associate themselves with the College and in doing so affirm their commitment to a philosophy of mutual tolerance and respect. All students admitted to Yale should understand the responsibility thus placed upon them. If any member of the community should interfere with its functions or show himself or herself unable or unwilling to assist in them, the community may find it necessary to protect itself by suspending or terminating his or her membership. Indeed, by formal vote the Yale College Faculty has affirmed:

1. Its commitment to protect free expression and peaceful dissent and to preserve mutual respect and charitable relations among all members of the Yale community.

2. Its belief that physical restriction, coercion, or intimidation of any member of that community is contrary to the basic principles of the University.

3. Its expectation that such action will ordinarily result in temporary or permanent separation from Yale College.

The purpose of the regulations that follow is to spell out some of the actions that place the community in jeopardy and that may therefore result in suspension or expulsion from it. In general, these regulations are concerned with conduct on campus, but students must recognize that Yale College exists within a larger community that has its own laws and standards of behavior and that membership in Yale College confers no exemption from those laws and standards. Unruly behavior or illegal or destructive acts that adversely affect the community surrounding the Yale campus will not be condoned. Students, whether on campus or off campus, are under the jurisdiction of the city, state, and national governments. While off-campus misconduct will not normally be the basis for disciplinary action by the University, if such conduct imperils the integrity and values of the University community it may result in disciplinary action.

Authority for disciplinary matters proceeds from the Yale Corporation, which has empowered the Yale College Faculty to oversee disciplinary actions with respect to undergraduates. Penalties for misconduct by undergraduates are ordinarily imposed by the Yale College Executive Committee, a standing committee of the Yale College Faculty by whose authorization it acts. The Executive Committee's jurisdiction includes offenses described in the *Undergraduate Regulations* as well as other actions on the part of students that may in the judgment of the Committee warrant disciplinary action because they may imperil the integrity and values of the Yale community or the well-being of its members. The Executive Committee may assign penalties as provided in the *Undergraduate Regulations*, though in some cases that authority resides in the President of the University, or is delegated to other University officials such as the Masters of the Residential Colleges, the University Librarian, the Directors of the Yale Computer Facilities, and the Director of the Division of University Dining Halls, who may summarily impose certain penalties for violations of the Dormitory Regulations, the Library Regulations, the Computer Facility Regulations, and the Dining Hall Regulations. See Chapter IV, DORMITORY REGULATIONS; Appendix C, UNIVERSITY LIBRARY DISCIPLINARY REGULATIONS; Section C, COMPUTER FACILITIES, under Chapter XV, USE OF ADDITIONAL SERVICES AND FACILITIES; and Chapter V, DINING HALL REGULATIONS. See also under DISCIPLINARY PENALTIES below in this chapter regarding emergency and interim suspensions.

As an institution, the Executive Committee is responsible to the Yale College Faculty and ultimately to the University. The Committee is charged with protecting the Yale College community so as to assure the integrity of academic instruction, the well-being of students, and the preservation of the property and educational resources of the University. The Committee is bound at all times to consider the manner in which its actions and decisions may affect the persons and groups—faculty, student body, administration, and staff—whose activities carry forward and foster the life of Yale College. All proceedings and records of the Executive Committee are confidential.

The Executive Committee is appointed by the Dean of Yale College. It has thirteen members: three tenured members of the Yale College faculty; three untenured members of the Yale College faculty; three undergraduates; the Dean of Yale College or the Dean's designated representative; and the three officers of the Committee, the Chairman, the Secretary, and the Factfinder.

A member of the faculty finding evidence of academic dishonesty on a class assignment or examination may bring the matter to the attention of the Committee. Any member of the faculty, Residential College Master, Residential College Dean, or member of the University administration or staff may bring to the attention of the Committee an alleged infraction of the non-academic Undergraduate Regulations. An undergraduate student may bring a complaint of a non-academic infraction to the attention of the Committee only in conjunction with his or her Residential College Master, Residential College Dean, a member of the Yale College Dean's Office, a member of the Yale College Sexual Harassment Board, a Human Relations Counselor, a member of the President's Committee on Racial and Ethnic Harassment, or the University Police.

See the complete DISCIPLINARY PROCEDURES OF THE YALE COLLEGE EXECUTIVE COMMITTEE, printed as Appendix B to this publication.

Among the offenses that are subject to disciplinary action are the following:

A. CHEATING. Cheating on examinations, plagiarism, and improper acknowledgement of sources in essays, and the use of a single essay in more than one course except in academically appropriate circumstances with the prior permission of the instructors. See the memorandum of the Yale College Executive Committee, CHEATING, PLAGIARISM, AND DOCUMENTATION, which appears as Appendix F to this publication.

B. FALSIFICATION OF DOCUMENTS. Forging, altering, misrepresenting or otherwise falsifying any transcript, academic record, identification card, or other official University document. See also Section A, UNDERGRADUATE CAREER SERVICES, under Chapter XV, USE OF ADDITIONAL SERVICES AND FACILITIES.

C. PHYSICAL RESTRICTION, ASSAULT, COERCION, OR INTIMIDATION OF ANY MEMBER OF THE COMMUNITY. Any act of harassment, intimidation, coercion or assault, or any other act of violence against any member of the community, including harassment on the basis of race, ethnic origin, sex, or sexual orientation, and also including sexual harassment.

D. INTERFERENCE WITH UNIVERSITY FUNCTIONS. Participation in any effort to prevent or disrupt a class or other University function, or to seize or occupy any University building or part thereof, or to violate the right of an audience to listen at a University function. See also Chapter II, FREE EXPRESSION, PEACEFUL DISSENT, AND DEMONSTRATIONS.

E. RIOTS. Participation in or attendance at riots or mass disturbances by students on the city streets or on any area of the campus.

F. DEFIANCE OF AUTHORITY. Defiance or belligerence toward or lying to a University police officer, faculty member, or other University official who, in the line of duty, issues an order or asks for identification or information. Students are expected to carry University identification cards at all times and must identify themselves to University officials upon request. It is understood that University officials or police officers will identify themselves before making such a request.

G. MISCONDUCT AT A FORMAL HEARING. Deliberate and knowing misrepresentation or lying during a formal inquiry conducted by University authorities.

H. MISREPRESENTATION IN APPLYING FOR FINANCIAL AID. Knowingly and deliberately supplying false information in an application for financial aid from the University or processed by the University.

I. WEAPONS AND EXPLOSIVES. The possession or use of explosives, incendiary materials, or weapons on University property is absolutely prohibited. Firearms and ammunition for sporting purposes must be registered and deposited with the University Police.

J. ALCOHOL. The unlawful possession, use, or distribution of alcohol on University property or as part of any University activity is prohibited.

K. DRUGS. The unlawful possession, use, or distribution of illicit drugs on University property or as part of any University activity is prohibited.

L. THEFT AND WILLFUL PROPERTY DAMAGE.

M. TRESPASSING. Presence in University buildings or on University property at times or places where such presence is prohibited, as for example when a building, facility, or room is locked and permission to enter has not been given. See also "Restricted Areas" in Section B, CONDUCT IN THE DORMITORIES, under Chapter IV, DORMITORY REGULATIONS.

N. IMPROPER USE OF FIRE PREVENTION EQUIPMENT. Deliberate and unnecessary activation of fire alarms, or tampering with fire alarms or smoke detectors, or deliberate and unnecessary discharge of fire extinguishers. See also "Fire Extinguishers" and "Fire Alarms and Smoke Detectors" in Section B, CONDUCT IN THE DORMITORIES, under Chapter IV, DORMITORY REGULATIONS.

O. UNAUTHORIZED OR FRAUDULENT USE OF SERVICES OR FACILITIES (such as computer services or the University's telephone facilities). See also Chapter XV, USE OF ADDITIONAL SERVICES AND FACILITIES.

P. LIBRARY OFFENSES. Unauthorized removal, stashing or sequestering, defacing, mutilating, or theft of library materials, or willful and repeated failure to respond to recall notices. See also Chapter III, LIBRARY REGULATIONS, and Appendix C, UNIVERSITY LIBRARY DISCIPLINARY REGULATIONS.

Q. VIOLATION OF THE REGULATIONS ON SOCIAL FUNCTIONS OR THE YALE COLLEGE REGULATIONS ON ALCOHOLIC BEVERAGES. See Chapter XII, REGULATIONS ON SOCIAL FUNCTIONS and Chapter XIII, YALE COLLEGE REGULATIONS ON ALCOHOLIC BEVERAGES.

R. A DELIBERATE ATTEMPT TO COMMIT ANY OF THE ABOVE OFFENSES IS IN ITSELF AN OFFENSE.

Concerning these and other offenses, the Executive Committee will not consider that the use of alcohol or drugs constitutes a mitigation of the seriousness of an offense. Further, a student found guilty of a disciplinary offense while under the influence of alcohol or drugs will be referred to the Substance Abuse Counselor at the University Health Services. Any record of such a visit is confidential to the Substance Abuse Counselor and does not become part of a student's Yale College record.

DISCIPLINARY PENALTIES. The following penalties are among those which may be imposed by the Yale College Executive Committee:

1. *Reprimand.* (This is a matter of internal record only.)

2. *Probation.* The student is in official jeopardy. The commission of a serious offense while on probation will normally result in suspension or expulsion.

3. *Restriction.* Denial of the use of certain University facilities or of the right to participate in certain activities or to exercise certain privileges.

4. *Suspension.* Separation from the University for a stated period of time. A suspended student forfeits all privileges of enrollment, including residence, attendance at classes, participation in organized extracurricular activities, and use of University libraries as well as athletic and other facilities. Suspension may require petition for readmission.

5. *Expulsion.* Permanent separation from the University.

6. *Fines.*

In addition to imposing these penalties for offenses subject to disciplinary action, the University may refer students for prosecution.

The President of the University, or an official of the University authorized by the President, may impose an emergency suspension from residence or academic status when, in the judgment of the President, such action appears necessary for reasons relating to a student's physical or emotional safety and well-being or the safety and well-being of a member of the University community or of University property, or may impose an immediate interim suspension when it appears necessary to deal with a continuing disturbance, a forcible interference by students with any University activity or with the free movement of any member of the University community. When an undergraduate in Yale College is suspended in this fashion, the matter may be referred either to the Yale College Executive Committee or to the University Tribunal, if the Tribunal is convoked. Interim suspension may remain in effect until the Executive Committee or the University Tribunal has taken action with regard to the student; however, interim suspension may be lifted earlier by action of the President or the President's authorized designee, or by action of the Executive Committee or University Tribunal panel after a preliminary review, which will be held at the earliest opportunity. (On the University Tribunal, see Appendix E, A BRIEF NOTE ON THE UNIVERSITY TRIBUNAL.)

7 Judicial System

Note: for general provisions of the University's Honor System, see the Honor System chapter.

The bodies that compose the judicial system are the Appellate Review Board, the Undergraduate and Graduate Student Conduct councils, the Undergraduate Honor Council and the honor councils of the Graduate School and professional schools, the Joint Conduct Council, and the student affairs deans. Disciplinary authority may also be exercised by the Interfraternity and Panhellenic councils and Vanderbilt Student Communications, Incorporated. The nature of the disciplinary authority is described in the constitutions or bylaws of each of these bodies.

Rights of students or student groups charged with misconduct are addressed through the following judicial procedures that are designed to provide a fair hearing and a just decision. The basic elements of the process are:

- Written and timely notice of charges against students, including possible consequences
- Opportunity for students to present all relevant evidence at a hearing, to challenge adverse testimony and evidence, to speak in their own behalf, to call witnesses, and to be accompanied by a student, faculty, or staff adviser of their own choosing who has not had legal training (except in cases involving students in the law school)
- Decisions reached on the basis of the evidence presented, precedents, disciplinary regulations, and the character of the students.
- An unbiased appellate body to which students may appeal.

Jurisdiction over Non-Vanderbilt Students

All persons taking courses or participating in activities of the University as students, even if not registered primarily at Vanderbilt, fall under the jurisdiction of the judicial system. This includes those taking part-time courses of study, transients during the summer or another session, and students cross-registered from a neighbor institution. Procedures for hearing charges against these students are the same as for full-time Vanderbilt students. A notification of the findings of hearings will be sent to the appropriate officer of the institution in which the students are primarily registered.

Undergraduate Student Conduct Council

The Undergraduate Student Conduct Council, chaired by the Dean of Residential and Judicial Affairs and composed of one faculty and one student representative from each of the undergraduate schools, has original jurisdiction in all cases of non-academic misconduct involving undergraduates.

The Conduct Council hears cases involving violations of the University conduct regulations, of residence hall regulations, and of University policies referred to it by appropriate University officials or the Council chair. The chair or the chair's delegate may hear a case without benefit of the Council at the student's option (except in the case of sexual assault, which cases will be heard by the Conduct Council).

In cases of sexual assault, the Dean of Residential and Judicial Affairs will appoint a hearing panel of no more than five members from those serving on the Conduct Council, and the hearing will follow the procedures given below.

Judicial procedures for the overseas programs of the University are stated in the section on Overseas Programs for Undergraduates.

Each residence hall is an autonomous unit of Interhall, and dormitory officers enforce the regulations the unit has adopted. Undergraduate students who interfere with efforts of the officers to achieve an atmosphere conducive to study, rest, and recreation are referred to the Undergraduate Student Conduct Council.

In matters pertaining to general residence hall regulations not within the scope of residence hall units and set forth in this handbook in Residence Hall Regulations, a student has the option of having a case determined by a housing dean, the Conduct Council chair, or the Conduct Council.

Graduate Student Conduct Council

The Graduate Student Conduct Council has original jurisdiction in all cases of non-academic misconduct involving graduate and professional students. This Conduct Council may hear cases of violations of University policies referred to it by the deans of students or the Council chair. The chair or the chair's delegate may hear a case without benefit of the Council at the student's option (except in the case of sexual assault, which cases will be heard by the Graduate Student Conduct Council). The Council is composed of the Dean of Residential and Judicial Affairs, who serves as chair, and two students and two faculty members of the Graduate School and each of the professional schools. Only the Council members of the school in which a violation is alleged to have occurred participate in a hearing regarding that violation.

Joint Conduct Council

The Joint Conduct Council has original jurisdiction in all cases involving undergraduate students who have significant academic and non-academic difficulties. The Undergraduate Honor Council and the Undergraduate Conduct Council both appoint members to serve on the Joint Conduct Council. The Joint Conduct Council is composed of representatives from the faculty and students of the undergraduate schools. Procedures of the Joint Conduct Council are similar to those of the Honor Council and the Conduct Council.

In cases of doubt, the chair of the Appellate Review Board will determine whether a case will be heard originally by the Honor Council, the Undergraduate Conduct Council, or the Joint Conduct Council.

Appellate Review Board

The Appellate Review Board is chaired by a member of the faculty. Faculty and student representatives from each school of the University complete the board.

The following decisions may be appealed to the Appellate Review Board:

- Decisions of honor councils
- Decisions of the student conduct councils
- Decisions of other organizations such as Interfraternity and Panhellenic councils
- Decisions of other designated University hearing officials

Procedures of the Appellate Review Board may be requested from the chair. For more information, see the section on Appeals.

Student Conduct Councils and Hearings by Deans of Students

The procedures given here are followed by each judicial body and apply to individuals and groups. An accused student will be informed in writing of a charge at least three days before the hearing. He or she may waive the three-day waiting period and request an earlier hearing. The charge notice will include the specific regulation or policy alleged to have been violated.

The accused may choose a faculty, staff, or student adviser who has not had formal legal training (except in cases concerning students in the School of Law), to accompany him or her during the hearing.

The accused may testify personally and present witnesses in his or her behalf. The student may examine all evidence that may form the basis for disciplinary action. The adviser may not address the judicial body, but may consult with the accused student during the hearing. No person who has a substantial interest in the case or in a related case as a defendant or adviser to a defendant may serve as an adviser.

Persons conducting the hearing and considering statements against the accused (for example, statements in the student's file), must advise the accused of the content of the statements and give the student an opportunity to rebut inferences that might be drawn. The accused may present testimony and make arguments not only with regard to the offense but also with regard to excuse, justification, and mitigating circumstances. The accused may also speak to the question of the appropriateness of any particular sanction.

The decision of the persons hearing the case will be based on evidence presented at the hearing. Evidence acquired through unauthorized searches will not be considered. A search of a student's premises may be authorized by the Dean of Students, or the Dean or Associate Dean of Residential and Judicial Affairs if there is reasonable cause to believe that a violation of University policy is occurring or has occurred.

If the accused is found guilty of misconduct, the decision will specify the acts of misconduct of which the accused is guilty and the sanction to be imposed. The decision will be delivered to the student promptly, and at the time of its delivery the student will be reminded of the opportunity to appeal and of the time limits and procedures involved in an appeal.

Hearings may be recorded in writing or on tape. The honor council adviser or Dean of Residential and Judicial Affairs, as appropriate, is custodian of the records of the hearings. A written record of conclusions and penalties assessed is always filed in cases resulting in disciplinary action. These conclusions become a part of the record and may be examined by the student in the case. If the case is appealed, a finding of fact and written opinion will be submitted to the appellate body. A finding of fact and opinion resulting in disciplinary action becomes part of the student's record as well as the record of the proceedings and may be examined by the student in the case.

Investigations and hearings are not publicized or open to the public. Hearing officers must hold these matters in confidence.

If a member of a judicial body has a conflict of interest, he or she is ineligible to consider a case or to hear an appeal. Individuals should declare themselves ineligible on these grounds. Also, the body may, by a majority vote, declare any member ineligible on these grounds.

Procedures for Cases of Sexual Assault

In cases of sexual assault, the procedures will be as follows:

1. the Dean of Residential and Judicial Affairs will appoint a hearing panel of no more than five members from those serving on the Conduct Council or the Graduate Student Conduct Council, whichever is appropriate;
2. the Dean of Residential and Judicial Affairs will chair each panel;
3. both women and men will be represented on the hearing panel;
4. the hearing panel will be representative of both the students and faculty/administration, not including the Dean of Residential and Judicial Affairs;
5. any appointed panel member who personally knows either the victim or the accused will not be allowed to sit on the panel (and will be replaced by another member of the appropriate Conduct Council);
6. all members of the Conduct Councils will be counseled on issues involved in date rape, utilizing both University and community resources, prior to hearing a sexual assault case;
7. both the accused and the victim will be allowed to be present throughout the hearing;
8. both the accused and the victim will be allowed to choose one person who has not had formal legal training to accompany them throughout the hearing;
9. both the accused and the victim will have the opportunity to ask questions of each other and any other witness testifying at the hearing;
10. the consumption of alcohol may not be used as an excuse for rape or sexual battery by the accused;
11. the victim's sexual history is not relevant to the outcome of the hearing;
12. a hearing will be convened within two weeks of the incident report. If this condition cannot be met, both

parties should be informed within two weeks of the report about the status of the case.

Appeals

A student or group found guilty of misconduct and/or against whom a sanction has been imposed may appeal to the chair of the Appellate Review Board. The appeal petition must be in writing and specify the grounds for appeal. It must be filed within seven class or exam days of the original notification of the finding of guilt, or within two calendar weeks if school is not in session for seven days following the notification.

Examples of grounds for review for those petitioning for appeal include the following:

- Insufficient evidence to support the decision
- Harshness of sanction sufficient to show an abuse of discretion by the original hearing authority
- Procedural irregularity that undermined the student's ability to present a defense.

New evidence not available at the time of the original hearing must be brought to the attention of the original hearing body for consideration before it can be presented on appeal.

During the consideration of the appeal petition by the Appellate Review Board, the board or its authorized agent may call witnesses, including the appellant, and may examine the record of the case at will. Disposition of the petition is made by a majority vote of the voting membership of the board.

The full board or a subcommittee may conduct the appeal hearing. Usually, the function of the board is to consider whether the persons conducting the original hearing proceeded fairly and decided the case justly. Board members who participated directly in the original hearing may participate only as witnesses in the appeal.

Usually, after the board determines the validity of the appeal it directs that a new hearing be held by the initial hearing authority with instructions as necessary regarding the conduct of that hearing.

Only in extraordinary circumstances would the board reconsider the entire case. In the event of a re-hearing, standards of procedure will in substance be those for original hearings, but the board may provide additional procedural rules if necessary. The board may affirm the original decision, remand the case back to the original hearing body with instructions, or hear the case *de novo.*

Students, faculty members, administrative officers, or groups within the University may request the Appellate Review Board to consider a concern that the disciplinary system of the institution is not operating effectively or justly. Upon receipt of such a request for review, the chair makes a preliminary investigation to clarify the matter. The chair then brings the request to the attention of the board. The board may take recommendations for action to the appropriate authority.

The Appellate Review Board also has supervisory authority, in consultation with the University Office of General Counsel, the Office of the Dean of Students, the Office of Residential and Judicial Affairs, and other appropriate University officials to review and propose updates of the procedures of the persons and bodies whose decisions have been appealed to ensure that the student's rights are protected.

Disciplinary Sanctions

- *Reprimand.* An admonition and an official warning (such action may also include repair or replacement of University property when loss or damage is part of the offense).
- *Restriction.* Loss of privileges that are consistent with the offense and the rehabilitation of the student.
- *Fines.* Published monetary fines for certain violations.
- *Disciplinary probation.* Placing a student in a probationary status that takes away the privilege of holding office and may also include social restrictions.
- *Suspension.* Dismissal from the University for a specified or indefinite period of time.

- *Expulsion.* Permanent dismissal from the University.
- *Counseling, Evaluation, and Treatment Programs.* In some cases of misconduct, such as those committed under the influence of alcohol or other drugs, participation in an evaluation and/or treatment program by an approved counseling service may be required as a part of a sanction. Such treatment may also be a condition of readmission to the University or a condition for remaining in the University.

In cases of sexual assault the following policies will apply:

1. On the first conviction, the expected penalty will be a suspension beginning immediately and extending for the remainder of the semester in which the offense occurred and the following semester.
2. For conviction of two offenses the expected penalty will be immediate expulsion.
3. The hearing panel may, at its discretion, consider circumstances which would reduce or enhance these penalties.
4. It is further recommended that psychological counseling be considered for those found guilty of sexual assault and that the hearing panel may set conditions for readmission to Vanderbilt at its discretion.

In all cases, judicial bodies have authority to establish various penalties appropriate to the violations or infractions. Routine penalties may be established for certain infractions and may also be appealed to the appropriate judicial body according to prescribed appeal procedures. Disciplinary actions may also be applied in combination. For example, a student may be suspended for one term and readmitted subject to restrictions for the next term.

Suspension, pending a hearing, may be imposed when there is reason to believe the action is necessary to maintain University functions or to protect the safety of individuals.

Penalties for violations of student regulations will usually be increased by one level of severity when it is determined that the violation was motivated in part by prejudice toward the victim because of the perception that the victim is of a different race, sex, religion, color, national or ethnic origin, age, disability, or veteran's status. Thus, the penalty of reprimand would become disciplinary probation; probation would become suspension; and suspension would become expulsion. Violations of the discriminatory harassment policy will not be subject to this enhancement-of-penalties policy.

Upon completion of cases involving a disciplinary sanction, the appropriate dean or other University official will take action to implement the decision of the judicial body, and the dean of the school in which the student is enrolled will be notified if the finding will affect the student's academic status. However, action is normally not taken until final judicial decision is reached, including appeal.

In reporting a disciplinary action effective for an indefinite period, the judicial body will ask the appropriate dean to recommend when the action should be terminated. The body must approve the termination by a majority of its voting membership.

Students may leave the University involuntarily for physical or emotional reasons, academic failure, failure to meet financial obligations to the University, or circumstances outside the University's jurisdiction. Withdrawal from the University under these circumstances does not constitute disciplinary sanction; therefore, re-enrollment after such withdrawal is handled through normal administrative processes.

University of Iowa

II. STUDENT RESPONSIBILITIES

A. Code of Student Life

Introduction

Academic institutions exist for the advancement of knowledge, the pursuit of truth, the development of students, and the general well being of society. Free inquiry and free expression are indispensable to the attainment of these goals. As members of the academic community, students are encouraged to develop a capacity for critical judgment and to engage in a sustained and independent search for truth. Freedom to teach and freedom to learn are inseparable facets of academic freedom. The freedom to learn depends upon appropriate opportunities and conditions in the classroom, on the campus, and in the larger community. Students are expected to exercise their freedom to learn with responsibility and to respect the general conditions conducive to such freedom. Accordingly, the University has developed the following general regulations pertaining to student conduct which provide and safeguard the right of every individual student to exercise fully freedom to learn without undue interference by others.

The Code of Student Life is applicable whether or not the University is in session and pertains to all persons registered for a University of Iowa course, all persons admitted to any academic program, and all persons attending a University-sponsored program. In addition, conduct violative of the Code of Student Life and engaged in prior to admission may be taken into account in the admissions decision and may be grounds for filing disciplinary charges after admission or acceptance into a program. For purposes of the conduct regulations and judicial procedures, a student is any person fitting one or more of these descriptions.

It is the duty and responsibility of all students to acquaint themselves with all provisions of the code and particularly with the rules and regulations pertaining to personal conduct, and every student will be conclusively presumed to have knowledge of all rules and regulations contained in the code from the date of his or her initial registration at the University. The code may be amended at any time by authority of the president of the University. Amendments are effective upon approval of the president and publication in the Code of Student Life, provided that if the president deems an amendment of immediate importance, it shall be effective from and after publication in the *Daily Iowan*, which will be conclusively presumed as adequate notice to all students. A full and complete text of the code and other general University rules and regulations of personal conduct currently in effect, including all amendments, shall be on file in the Office of the Vice President for Student Services at all times and shall be available for inspection by students. The vice president for student services shall be responsible for making available to students copies of all amendments deemed of immediate importance and for distributing copies of such amendments to all housing units, affected student organizations, and otherwise, as the vice president for student services deems appropriate, provided that failure to make such distribution shall not affect the effectiveness of such amendments.

General Conduct Regulations

Any student who commits any of the following acts of misconduct shall be subject to disciplinary action by the University. These regulations shall apply only where a student's misconduct has adversely affected some University process or function or some other distinct and clear interest of the University as an academic community. These regulations shall be construed so as not to abridge any student's constitutional rights of free expression of thought or opinion, free association, peaceable assembly, or the petition of authorities.

1. Academic misconduct, including the acquisition of honors, awards, certification or professional endorsements, degrees, academic credits, or grades by means of cheating, plagiarism, or falsification, including forgery, with respect to any examination, paper, project, application, recommendation, transcript, or test, or registration document or by any other dishonest means whatsoever, or aiding or abetting another student to do so. Resolution of Section 1 complaints will normally be handled within the college or department concerned, with provision for review (see Part C, Academic Misconduct).

2. Willful misrepresentation of any material fact to any member of the faculty or staff of the University or to any office, department, or committee thereof, or willful misrepresentation to anyone, within or without the University community, of his or her status with the University or of the support, sponsorship, or approval by the University of the services or activities of any person, group, or organization.

3. Willful failure to comply with a proper order or summons of any member of the faculty or other University official, properly identified -- by stating his or her name and title if requested by a student -- and acting within the scope of his or her authority, or willful failure of a student to identify himself or herself by stating his or her name to such faculty member or official. In the absence of specific authorization by a member of the central administration, it is understood that faculty members who do not hold administrative appointments are authorized to require identification as contemplated in this section only in a class, in the faculty member's office, in a library as to persons defacing or otherwise abusing library materials, and at University functions at which the faculty member is presiding.

4. Forgery, alteration, or misuse of any University record, form, document, or student identification card.

5. (a) Intentionally disrupting the orderly processes of the University, or (b) intentionally obstructing or denying access to services or facilities by those entitled to use such services or facilities, or (c) intentionally interfering with the lawful rights of other persons on the campus, or (d) inciting others to do acts proscribed by paragraphs (a), (b), or (c) of this section.

6. Willful demonstrations within the interior of any University building or structure, except as specifically authorized and subject to reasonable conditions imposed to protect the rights and safety of other persons and to prevent damage to property.

7. Unauthorized entry into or occupation of any University room, building, or area of the campus, including such entry or occupation at any unauthorized time, or any unauthorized or improper use of any University property, equipment, or facilities.

8. Intentional setting of fires in any University building or on the campus without proper authority, or intentional sounding of a false fire alarm or improper use of fire prevention equipment in any University building or on the campus.

9. Misuse or misappropriation of University property or private property on campus or off-campus in connection with University activities, including but not limited to theft or wrongful appropriation, or willful destruction, damage, defacing, or mutilation of any property belonging to or in the possession or custody of another member of the University community or of the University.

10. Assaulting, threatening, physically abusing, unduly harassing, or endangering in any other manner the health or safety of (a) a University student, staff, or faculty member if such conduct relates to the official business of the University or (b) any person on the campus or at any University-sponsored or supervised function or event.

11. Use or possession of serviceable firearms, ammunition, explosives, fireworks, or other dangerous articles on campus or within any University building on the campus, or at any University-sponsored or supervised function or event, except in authorized facilities.

12. Possession or consumption of an alcoholic beverage on campus, within any University building, or at any University-sponsored or supervised function or event off-campus, except as permitted under the Policy Regarding the Use of Illegal Drugs and Alcohol, Code of Student Life, the Residence Hall Guidebook, or as authorized by other University regulations.

13. Use or possession of any narcotic drug, marijuana, or any other addictive, dangerous, or controlled substance on campus. Students found in violation of this section will, under ordinary circumstances, be required to complete a substance abuse evaluation and attend any educational or counseling sessions recommended as a result of the evaluation.

14. Sale, manufacture, distribution, or administration of any drug described in Section 12 or 13.

15. (a) Intentionally disrupting access of other students, faculty, or staff members to University computer resources, or (b) knowingly obtaining without authorization access to a computer account assigned to another person, or (c) knowingly using an account belonging to another University student, faculty, staff member, or academic department for other than its intended purpose without permission from the owner, or using an inactive account, or (d) using University computer equipment to interfere with the lawful rights of others by such activities as falsifying or altering records or documents, damaging programs belonging to another, sending harassing or threatening material, or duplicating copyrighted software unlawfully, or (e) assisting another person to do any act proscribed under this section.

16. Violation of any other rule, regulation, or policy which may be promulgated by the president of the University or an authorized representative, by any college, department, residence hall, office, or other facility within the scope of its authority, or by the State Board of Regents, provided such rules, regulations, or policies were published, posted, or otherwise adequately publicized or the student had actual knowledge thereof. Included among "such rules, regulations, or policies" are the University

Policy on Human Rights, the Policy on Sexual Harassment and Consensual Relationships, the Policy Concerning Use of the Pentacrest, and all provisions contained in the University residence halls contracts which pertain to personal conduct, including the Residence Hall Guidebook.

17. Any other conduct or action in which the University can demonstrate a clear and distinct interest as an academic institution and which seriously threatens (a) any educational process or other legitimate function of the University or (b) the health or safety of any member of the academic community. Student misconduct as defined in sections 1-16 which occurs on property governed by the State of Iowa Board of Regents is considered within the scope of this regulation. This includes the campuses of Iowa State University and the University of Northern Iowa. Misconduct committed on college campuses not governed by the State Board of Regents may also violate this regulation.

B. Judicial Procedure for Alleged Violations of the Code of Student Life

1. **Introduction.** These procedures are designed to cover complaints against students based on alleged violations of the Code of Student Life and the Policy on Sexual Harassment and Consensual Relationships. Alleged violations of Section 1 (academic misconduct) are handled under the procedures described in Part C, Academic Misconduct. Alleged violations of Sections 2-16 are ordinarily resolved by the dean of students, who may assign responsibility to a designated department head or assistant. Procedures used to resolve residence hall misconduct complaints are described below in Section H, Residence Hall Judicial System [not included here]. Persons with questions as to which University procedures apply to a particular situation may contact the Office of the Dean of Students or the University Ombudsperson for more information.

2. **Complaint Procedure.** Any person may bring a complaint against a student under these procedures based on an alleged violation of the Code of Student Life (see extent of jurisdiction in introduction). All such complaints shall be made to the Office of the Dean of Students. The Dean of Students shall designate a person to investigate and review the complaint and determine whether formal charges should be in order.

3. **Investigation.** The dean of students or designee will gather relevant evidence to determine whether there is a reasonable basis for believing that the Code of Student Life was violated. In order to make such a determination, the dean of students or designee may interview the complainant and witnesses. During the investigation, the dean of students or designee may meet personally with the student accused. Alternatively, the student accused may be notified of the complaint in writing and given an opportunity to respond. In the event that the dean of students or designee believes that evidence shows that there is a reasonable basis for believing a violation did occur, formal charges will be brought. During the period of investigation, the dean of students or designee may seek informal disposition of the complaint with the student accused. A student accused may consult with the University Ombudsperson or other advisers during the investigation as well as prior to a hearing or following a hearing.

4. **Charge Procedure.** If it is determined that formal charges should be brought, the dean of students or designee (hereinafter "charging party") shall send the student involved a Notice of Charge which shall (1) set out the rule or rules which have been allegedly violated, (2) state the alleged actions or behavior, (3) list the names of any witnesses intended to be called by the charging party, and (4) advise the student of his or her rights and of the hearing procedure, by attaching a copy of the hearing procedure to the letter.

When a student is formally charged with violating the Code of Student Life, the charging party may notify the student that an informal disposition of the charge may be pursued through discussions between the student and the charging party. If an informal disposition is made, the student will be sent a certified letter stating the terms of the disposition. No formal hearing will be held unless the terms of the informal disposition are breached.

If attempts at informal disposition of the alleged violation do not succeed, a Final Notice of Charge will be sent to the student with a copy to the administrative hearing officer. The administrative hearing officer shall be drawn from the pool of administrative hearing officers, selected by the president after consultation with the appropriate constituent groups. Another administrative hearing officer will serve if a student who is charged can adequately demonstrate why the assigned administrative hearing officer should not hear the case. Such an objection must be made in writing to the dean of student services, with a copy to the assigned administrative hearing officer, at least 2 class days before the hearing is scheduled to begin.

The dean of students may elect to resolve two or more complaints against one student at a single hearing. In addition, the dean of students may elect to resolve a complaint against two or more students at separate hearings or at a single hearing in the event that the complaints arose out of the same transaction or occurrence. Any challenge about complaint consolidation or separation will be determined by the administrative hearing officer. To challenge a decision to separate or consolidate a complaint, the student accused must notify the administrative hearing officer of the ground(s) for the challenge in writing at least 2 class days before the hearing is scheduled to take place.

The administrative hearing officer shall set the time and place for the hearing and shall send notice of the hearing to the student charged and the charging party. The Notice of Hearing shall be sent by certified mail or served personally. If the student charged or the charging party cannot appear at the time specified, the student or the charging party must contact the administrative hearing officer at least 2 class days before the hearing is scheduled to begin to arrange a different time for the hearing. If the student charged has not contacted the administrative hearing officer and does not appear at the hearing, the administrative hearing officer may make a decision on the charge and sanction, if any. If the charging party has not contacted the administrative hearing officer at least 2 class days before the hearing is scheduled to begin and does not appear, the administrative hearing officer may postpone or continue the hearing or may drop the charge.

The student charged will be mailed the Final Notice of Charge at least seven class days before the hearing. Final Notice of Charge will be sent by certified mail or served personally. The student charged will receive notification of the names of any additional witnesses intended to be called by the charging party at least 2 class days prior to the hearing.

5. **Rights at and Before Hearing.** The student charged has the following rights at a hearing: (1) to present his or her side of the story; (2) to present witnesses and evidence on his or her behalf; (3) to cross-examine witnesses presenting evidence against the student; (4) to be represented by an adviser at the student's expense (if any expense is entailed). Prior to the hearing, the student has a right to examine his or her disciplinary file in the Office of the Dean of Students. The student also has a right to know, upon request, which written documents or other physical evidence in the disciplinary file the University representative plans to present at the hearing. To examine the disciplinary file or learn what documents will be presented at the hearing, the student must make the request at least 2 class days before the hearing is scheduled to take place.

6. **Hearing.** The administrative hearing officer shall preside at the hearing. The hearing officer (1) shall inform the student of the charge, the hearing procedures, and his or her rights and (2) shall answer any questions the student charged may have on these matters. The hearing officer shall hear and receive evidence to determine whether a violation of the Code of Student Life has occurred, and may request character evidence to aid in the determination of an appropriate sanction. The hearing shall be recorded.

The hearing shall be closed unless the student charged specifically requests in writing at least 24 hours before the hearing that the hearing be open. If the student requests an open hearing, the administrative hearing officer may nonetheless elect to close all or part of the hearing. In the case of an open hearing, the administrative hearing officer may elect to exclude persons who are to appear as witnesses.

After informing the student of the charges, the hearing procedures, and his or her rights, the administrative hearing officer shall ask the student charged to plead guilty or not guilty. If the student pleads not guilty, the charging party shall present the University's case and shall offer evidence, which may include written testimony and witnesses, in support of the charge. The student charged may cross-examine the evidence presented by the charging party. The student charged may then present his or her case and may offer evidence, which may include written testimony and witnesses, in his or her behalf which shall be subject to cross-examination by the charging party.

The charging party bears the burden of showing by a preponderance of evidence that the Code of Student Life was violated. The administrative hearing officer may exclude irrelevant, immaterial, or unduly repetitive evidence. A finding by the administrative hearing officer shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their serious affairs. Objections to evidentiary offers may be made and shall be noted in the record.

After hearing all evidence on the issue of the Code of Student Life violations, the administrative hearing officer shall request both parties to offer evidence on the charging party's character, previous conduct, and similar evidence for the purpose of assisting the administrative hearing officer in determining an appropriate sanction, if any.

The administrative hearing officer's decision as to whether the Code of Student Life was violated and the appropriate sanctions, if any, may be rendered orally at the close of the hearing. A written decision shall ordinarily be issued within five working days after the hearing, and, in any event, within ten working days after the hearing.

Notification of Decision shall be sent to the student charged by certified mail, to the charging party, and to other appropriate University officers. If the charged student is found to have violated the Code of Student Life, the Notification of Decision letter shall include a statement of the right to appeal and reference to the appeal procedure.

7. Appeal. A student may appeal the decision of the administrative hearing officer to the Office of the Vice President for Academic Affairs (hereinafter "vice president"). The charged student shall file a written petition for appeal with supporting materials (if desired) in the vice president's office within ten class days following the receipt of the written notification of the administrative hearing officer's decision. The vice president shall designate an appropriate individual to review the record of the hearing, and the past disciplinary records of the charged person. Ordinarily, no new evidence will be received.

During the appeal, sanctions imposed by the administrative hearing officer shall remain in effect. A student suspended or expelled may request, from the dean of student services, permission to attend classes until the vice president's designee has made a decision on appeal.

The vice president's designee may recommend to the vice president that the decision be affirmed. The vice president's designee may also recommend that the decision be reversed, modified, or other appropriate relief granted, if substantial rights of the student have been prejudiced because (1) the finding of guilt was unsupported by substantial evidence in the record made before the administrative hearing officer when the record is viewed as a whole; (2) the sanction imposed for the violation was unreasonably harsh or inappropriate when the nature of the violation and the disciplinary record of the charged person are considered; (3) the decision as a whole was unreasonable, arbitrary, or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion; or (4) the procedures were not properly followed; or (5) new evidence, not reasonably available at the time of the hearing, is of sufficient importance to warrant reconsideration by the hearing officer. The student's written petition for appeal should specify the grounds for appeal.

The decision on appeal and the reasons therefore will be transmitted to the student charged, the charging party, and other appropriate University officials within 30 days of the receipt of the Notice of Appeal. The decision of the administrative hearing officer and the final decision on appeal, as well as the notices and other related documents, will be kept in the student's disciplinary file in the Office of the Dean of Students.

8. **Sanctions.** The administrative hearing officer has the authority to impose any one or a combination of the following disciplinary sanctions. These sanctions are to serve as guidelines rather than as a definitive list.

1. Disciplinary Warning: This is a strong, written warning that if there is a repetition of the same action or any other action in violation of the Rules and Regulations of the Code of Student Life, the student can expect additional disciplinary action. A record of the disciplinary action is kept on file.

2. Disciplinary Probation: When on disciplinary probation a student is not considered to be in good standing and any further violations may lead to suspension or expulsion from the University.

3. Restitution: A student may be assessed the repair/replacement cost for any damage he or she causes to property.

4. Educational Sanction: A student may be required to provide a specific service~~,~~ or participate in a specific program, receive specific instruction, or complete a research assignment. The student is responsible for related expenses, including expenses for education, counseling, or treatment, if any expense is entailed.

5. Exclusion from University Facilities or Activities: A student may be prohibited from attending a class, undertaking University employment, entering a building, participating in an extra-curricular activity sponsored by the University, representing the University in an official capacity, or using other services provided by the University. Such exclusion may be for a definite or indefinite period of time.

6. Disciplinary Suspension: A student may be involuntarily separated from the University for a stated period of time after which readmission is possible. The administrative hearing officer shall determine when the suspension will become effective. A student with one or more violations may be suspended from the university for an indefinite period of time. A student suspended indefinitely may petition to the dean of students for reinstatement.

7. Expulsion: When a student has a record of serious violations, he or she may be dismissed from the University permanently.

9. **Interim Suspension.** A student may be suspended from the University or have privileges revoked pending the outcome of a disciplinary proceeding if, in the judgment of the dean of students, the student's continued presence or use of privileges at the University pending the outcome of the proceeding is likely to cause harm to faculty, staff, or other students, other specified persons or groups, or University property. The dean of students will base an interim sanction judgment on evidence gathered in the initial stage of an investigation of the alleged conduct. Ordinarily, the dean or the dean's designee will converse with the student when interim suspension is considered.

A student suspended under this section may seek review of that decision by requesting the dean of students to reconsider the decision within five calendar days after the student has received Notice of Suspension. The student may request that an immediate formal University disciplinary hearing be held.

10. **Records.** If disciplinary action is taken against a student under these procedures and a sanction imposed, a record of the action will be kept by the Office of the Dean of Students. Record of nonacademic disciplinary sanctions will not, however, appear on the charged student's transcript.

Disciplinary actions are part of the education records of the student and, consequently, are not available for public disclosure or discussion. The Office of the Dean of Students will disclose information outside the University relating to a student's nonacademic disciplinary record, if prior written permission from the student has also been received.

11. **Concurrent Criminal Charges.** Students who face criminal charges may also be subject to University disciplinary sanctions if the conduct which gave rise to the criminal charges also violates the Code of Student Life. The University's investigation will not ordinarily commence until all criminal procedures have concluded. A student may request a hearing to resolve a University complaint while criminal charges are pending.

Because University regulations and procedures are distinct from criminal statutes and procedures, an outcome in a criminal or civil proceeding is not dispositive of the question of whether the Code of Student Life was violated.

C. Academic Misconduct

Undergraduate Colleges

As stated in Section 1 of the Code of Student Life General Conduct Regulations, violation of the regulations for academic misbehavior is ordinarily handled within the department or college concerned. The following procedure applies specifically to the colleges of Liberal Arts, Education, Engineering, Nursing, Pharmacy, and Business Administration. Students who wish more specific information should inquire at the office of their respective dean.

Reporting of Plagiarism and Cheating

All cases of plagiarism and cheating are reported for action to the designated person in the office of the dean of the college, through departmental channels, with a statement of the necessary facts. The department and the instructor concerned may also submit recommendations in each case for appropriate disciplinary action.

Disciplinary Action

(1) *By the Instructor.* The individual instructor may reduce the student's grade, including the assignment of the grade of "F" in the course. A report of this action should always be sent to the dean's office.

(2) *By the Dean.* The dean of the college or a student-faculty committee appointed by him or her may impose the following or other penalties as the offense may warrant: disciplinary probation, assessment of additional hours for the bachelor's degree, suspension from the college, or recommendation of expulsion from the University by the president.

Referral to the Office of the Vice President for Academic Affairs

(1) *By the Dean.* In the cases of flagrant or repeated offenses or for other reasons deemed sufficient by the dean of the college, the case and records may be referred to the Office of the Vice President for Academic Affairs for appropriate action.

(2) *By the Student.* If the student feels that the penalty imposed by the dean is unjust, the student may request a review by the Office of the Vice President for Academic Affairs.

Graduate Colleges

Questions of academic dishonesty arising within the colleges of Medicine, Law, and Dentistry, and the Graduate College are treated on an individual basis.

In the Graduate College, the questions are handled at the departmental level. If the departmental decision is appealed, the dean may appoint an appeals committee of faculty and students from a slate of nominees prepared by the Graduate Council and the Graduate Student Senate to recommend an appropriate course of action.

Students in professional graduate colleges should inquire at the office of their respective dean for further information.

ATTACHMENT I

STUDENT DISCIPLINARY PROCEDURE BYLAWS OF THE CITY UNIVERSITY OF NEW YORK, AS AMENDED BY THE BOARD OF TRUSTEES ON FEBRUARY 24, 1992

Section 15.3 STUDENT DISCIPLINARY PROCEDURES.

Complaint Procedures:

a. Any charge, accusation, or allegation which is to be presented against a student, and, which if proved, may subject a student to disciplinary action, must be submitted in writing in complete detail to the office of the dean of students promptly by the individual, organization or department making the charge.

b. The chief student affairs officer of the college or his or her designee will conduct a preliminary investigation in order to determine whether disciplinary charges should be preferred. The chief student affairs officer or his or her designee will advise the student of the charge(s) against him or her, consult with other parties who may be involved or who have information regarding the incident, and review other relevant evidence. Following this preliminary investigation, which shall be concluded within thirty (30) calendar days of the filing of the complaint, the chief student affairs officer or designee shall take one of the following actions:

(i) dismiss the matter if there is no basis for the allegation(s) or the allegation(s) does not warrant disciplinary actions. The individuals involved shall be notified that the complaint has been dismissed;

(ii) refer the matter to conciliation. If a matter is referred to conciliation the accused student shall receive a copy of the notice required pursuant to section 15.3e of this bylaw; or

(iii) prefer formal disciplinary charges.

Conciliation Conference:

c. The conciliation conference shall be conducted by the counselor in the office of the dean of students or a qualified staff or faculty member designated by the chief student affairs officer. The following procedures shall be in effect at this conference:

1. An effort will be made to resolve the matter by mutual agreement.

2. If an agreement is reached, the counselor shall report his/her recommendation to the chief student affairs officer for approval and, if approved, the complainant shall be notified.

3. If no agreement is reached, or if the student fails to appear, the counselor shall refer the matter back to the chief student affairs officer who will prefer disciplinary charges.

4. The counselor is precluded from testifying in a college hearing regarding information received during the conciliation conference.

Notice of Hearing and Charges:

d. Notice of the charge(s) and of the time and place of the hearing shall be personally delivered or sent by the chief student affairs officer of the college to the student at the address appearing on the records of the college, by registered or certified mail and by regular mail. The hearing shall be scheduled within a reasonable time following the filing of the charges or the conciliation conference. Notice of at least five business days shall be given to the student in advance of the hearing unless the student consents to an earlier hearing.

e. The notice shall contain the following:

1. A complete and itemized statement of the charge(s) being brought against the student including the rule, bylaw or regulation he/she is charged with violating, and the possible penalties for such violation.

2. A statement that the student has the following rights:

(i) to present his/her side of the story;

(ii) to present witnesses and evidence on his/her behalf;

(iii) to cross-examine witnesses presenting evidence against the student;

(iv) to remain silent without assumption of guilt; and

(v) to be represented by legal counsel or an advisor at the student's expense.

3. A warning that anything the student says may be used against him/her at a non-college hearing.

Faculty-Student Disciplinary Committee Procedures:

f. The following procedures shall apply at the hearing before the faculty-student disciplinary committee:

1. The chairperson shall preside at the hearing. The chairperson shall inform the student of the charges, the hearing procedures and his or her rights.

2. After informing the student of the charges, the hearing procedures, and his or her rights, the chairperson shall ask the student charged to plead guilty or not guilty. If the student pleads guilty, the student shall be given an opportunity to explain his/her actions before the committee. If the student pleads not guilty, the college shall present its case. At the conclusion of the college's case, the student may move to dismiss the charges. If the motion is denied by the committee the student shall be given an opportunity to present his or her defense.

3. Prior to accepting testimony at the hearing, the chairperson shall rule on any motions questioning the impartiality of any committee member or the adequacy of the notice of the charge(s). Subsequent thereto, the chairperson may only rule on the sufficiency of the evidence and may exclude irrelevant, immaterial or unduly repetitive evidence. However, if either party wishes to question the impartiality of a committee member on the basis of evidence which was not previously available at the inception of the hearing, the chairperson may rule on such a motion. The chairperson shall exclude all persons who are to appear as witnesses, except the accused student.

4. The college shall make a record of each fact-finding hearing by some means such as a stenographic transcript, a tape recording or the equivalent. A disciplined student is entitled upon request to a copy of such a transcript, tape or equivalent without cost.

5. The student is entitled to a closed hearing but has the right to request an open public hearing. However, the chairperson has the right to hold a closed hearing when an open public hearing would adversely affect and be disruptive of the committee's normal operations.

6. The college bears the burden of proving the charge(s) by a preponderance of the evidence.

7. The role of the faculty-student disciplinary committee is to listen to the testimony, ask questions of the witnesses, review the testimony and evidence presented at the hearing and the papers filed by the parties and render a determination as to guilt or innocence. In the event the student is found guilty, the committee shall then determine the penalty to be imposed.

8. At the end of the fact-finding phase of the hearing, the student may introduce additional records, such as character references. The college may introduce a copy of the student's previous disciplinary record, where applicable, provided the student was shown a copy of the record prior to the commencement of the hearing. The disciplinary record shall be submitted to the committee in a sealed envelope and shall not be opened until after the committee has made its findings of fact. In the event the student has been determined to be guilty of the charge or charges the records and documents introduced by the student and the college shall be opened and used by the committee for dispositional purposes, i.e. to determine an appropriate penalty if the charges are sustained.

9. The committee shall deliberate in closed session. The committee's decision shall be based solely on the testimony and evidence presented at the hearing and the papers filed by the parties.

10. The student shall be sent a copy of the faculty-student disciplinary committee's decision within five days of the conclusion of the hearing. The decision shall be final subject to the student's right of appeal.

11. Where a student is represented by legal counsel the President of the College may request that a lawyer from the general counsel's office appear at the hearing to present the college's case.

Section 15.4 APPEALS.

An appeal from the decision of the faculty-student disciplinary committee may be made to the president who may confirm or decrease the penalty but not increase it. His/her decision shall be final except in the case of dismissals or suspension for more than one term. An appeal from a decision of dismissal or suspension for more than one term may be made to the appropriate committee of the board. Any appeal under this section shall be made in writing within fifteen days after the delivery of the decision appealed from. This requirement may be waived in a particular case for good cause by the president or board committee as the case may be. If the president is a party to the dispute, his/her functions with respect to an appeal shall be discharged by an official of the university to be appointed by the chancellor.

Section 15.5 COMMITTEE STRUCTURE.

a. Each faculty-student disciplinary committee shall consist of two faculty members and two student members and a chairperson. A quorum shall consist of the chair and any two members. Hearings shall be scheduled at a convenient time and efforts shall be made to insure full student and faculty representation.

b. The president shall select in consultation with the head of the appropriate campus governance body or where the president is the head of the governance body, its executive committee, three (3) members of the instructional staff of that college to receive training and to serve in rotation as chair of the disciplinary committees. If none of the chairpersons appointed from the campus can serve, the president, at his/her discretion, may request that a chairperson be selected by lottery from the entire group of chairpersons appointed by other colleges. The chairperson shall preside at all meetings of the faculty/student disciplinary committee and decide and make all rulings for the committee. He/she shall not be a voting member of the committee but shall vote in the event of a tie.

c. The faculty members shall be selected by lot from a panel of six elected annually by the appropriate faculty body from among the persons having faculty rank or faculty status. The student members shall be selected by lot from a panel of six elected annually in an election in which all students registered at the college shall be eligible to vote. In the event that the student or faculty panel or both are not elected, or if more panel members are needed, the president shall have the duty to select the panel or panels which have not been elected. No individuals on the panel shall serve on the panel for more than two consecutive years.

d. In the event that the chairperson cannot continue, the president shall appoint another chairperson. In the event that a student or faculty seat becomes vacant and it is necessary to fill the seat to continue the hearing, the seat shall be filled from the faculty or student panel by lottery.

e. Persons who are to be participants in the hearings as witnesses or have been involved in preferring the charges or who may participate in the appeals procedures or any other person having a direct interest in the outcome of the hearing shall be disqualified from serving on the committee.

Section 15.6 SUSPENSION OR DISMISSAL.

The board reserves full power to dismiss or suspend a student, or suspend a student organization for conduct which impedes, obstructs, or interferes with the orderly and continuous administration and operation of any college, school, or unit of the university in the use of its facilities or in the achievement of its purposes as an educational institution.

The Chancellor or Chancellor's designee, a president or any dean may in emergency or extraordinary circumstances, temporarily suspend a student, or temporarily suspend the privileges of a student organization or group for cause, pending an early hearing as provided in bylaw section 15.3 to take place within not more than seven (7) school days. Prior to the commencement of a temporary suspension of a student, the college shall give such student oral or written notice of the charges against him/her and, if he/she denies them, the college shall forthwith give such student an informal oral explanation of the evidence supporting the charges and the student may present informally his/her explanation or theory of the matter. When a student's presence poses a continuing danger to person or property or an ongoing threat of disrupting the academic process, notice and opportunity for denial and explanation may follow suspension, but shall be given as soon as feasible thereafter.

[Section 15.7, which is not printed herein, is the renumbered former Section 15.6 on the University Student Senate]

Section 15.8 COLLEGE GOVERNANCE PLANS.

The provisions in a duly adopted college governance plan shall not be inconsistent with the provisions contained in this article.

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ATTACH1

ATTACHMENT II

BOARD OF TRUSTEES
THE CITY UNIVERSITY OF NEW YORK

RULES AND REGULATIONS FOR THE MAINTENANCE OF PUBLIC ORDER PURSUANT TO ARTICLE 129-A OF THE EDUCATION LAW

The tradition of the University as a sanctuary of academic freedom and center of informed discussion is an honored one, to be guarded vigilantly. The basic significance of that sanctuary lies in the protection of intellectual freedom: the rights of professors to teach, of scholars to engage in the advancement of knowledge, of students to learn and to express their views, free from external pressures or interference. These freedoms can flourish only in an atmosphere of mutual respect, civility, and trust among teachers and students, only when members of the University community are willing to accept self-restraint and reciprocity as the condition upon which they share in its intellectual autonomy.

Academic freedom and the sanctuary of the University campus extend to all who share these aims and responsibilities. They cannot be invoked by those who would subordinate intellectual freedom to political ends, or who violate the norms of conduct established to protect that freedom. Against such offenders the University has the right, and indeed the obligation, to defend itself. We accordingly announce the following rules and regulations to be in effect at each of our colleges which are to be administered in accordance with the requirements of due process as provided in the Bylaws of the Board of Trustees.

With respect to enforcement of these rules and regulations we note that the Bylaws of the Board provide that:

> "THE PRESIDENT. The president with respect to his education unit, shall:
>
> a. Have the affirmative responsibility of conserving and enhancing the educational standards of the college and schools under his jurisdiction;
>
> b. Be the advisor and executive agent of the Board and of his respective College Committee and as such shall have the immediate supervision with full discretionary power in carrying into effect the Bylaws, resolutions, and policies of the Board, the lawful resolutions of the several faculties;
>
> c. Exercise general superintendence over the concerns, officers, employees, and students of his educational unit."

1. RULES

1. A member of the academic community shall not intentionally obstruct and/or forcibly prevent others from the exercise of their rights. Nor shall he interfere with the institution's educational processes or facilities, or the rights of those who wish to avail themselves of any of the institution's instructional, personal, administrative, recreational, and community services.

2. Individuals are liable for failure to comply with lawful directions issued by representatives of the University/college when they are acting in their official capacities. Members of the academic community are required to show their identification cards when requested to do so by an official of the college.

3. Unauthorized occupancy of University/college facilities or blocking access to or from such areas is prohibited. Permission from appropriate college authorities must be obtained for removal, relocation, and use of University/college equipment and/or supplies.

4. Theft from, or damage to University/college premises of property, or theft of or damage to property of any person on University/college premises is prohibited.

5. Each member of the academic community or an invited guest has the right to advocate his position without having to fear abuse, physical, verbal, or otherwise, from others supporting conflicting points of view. Members of the academic community and other persons on the college grounds shall not use language or take actions reasonably likely to provoke or encourage physical violence by demonstrators, those demonstrated against, or spectators.

6. Action may be taken against any and all persons who have no legitimate reasons for their presence on any campus within the University/college, or whose presence on any such campus obstructs and/or forcibly prevents others from the exercise of the rights or interferes with the institution's educational processes or facilities, or the rights of those who wish to avail themselves of any of the institution's instructional, personal, administrative, recreational, and community services.

7. Disorderly or indecent conduct on University/college-owned or controlled property is prohibited.

8. No individual shall have in his possession a rifle, shotgun, or firearm or knowingly have in his possession any other dangerous instruments or material that can be used to inflict bodily harm on an individual or damage upon a building or the grounds of the University/college without the written authorization of such educational institution. Nor shall any individual have in his possession any other instrument or material which can be used and is intended to inflict bodily harm on any individual or damage upon a building or the grounds of the University/college.

9. Any action or situation which recklessly or intentionally endangers mental or physical health or involves the forced consumption of liquor or drugs for the purpose of initiation into or affiliation with any organization is prohibited.

10. The unlawful manufacture, distribution, dispensation, possession, or use of illegal drugs or other controlled substances by University students or employees on University/college premises, or as part of any University/college activities is prohibited. Employees of the University must also notify the College Personnel Director of any criminal drug statute conviction for a violation occurring in the workplace not later than (5) days after such conviction.

11. The unlawful possession, use, or distribution of alcohol by students or employees on University/college premises or as part of any University/college activities is prohibited.

2. PENALTIES

1. Any student engaging in any manner in conduct prohibited under substantive Rules 1-11 shall be subject to the following range of sanctions as hereafter defined in the attached Appendix: admonition, warning, censure, disciplinary probation, restitution, suspension, expulsions, ejection, and/or arrest by the civil authorities.

2. Any tenured or non-tenured faculty member, or other member of the instructional staff, or member of the classified staff engaging in any manner in conduct prohibited under the substantive Rules 1-11 shall be subject to the following range of penalties: warning, censure, restitution, fine not exceeding those permitted by law or by the Bylaws of The City University of New York or suspension with/without pay pending a hearing before an appropriate college authority, dismissal after a hearing, ejection, and/or arrest by the civil authorities, and, for engaging in any manner in conduct prohibited under substantive rule 10, may, in the alternative, be required to participate satisfactorily in an appropriately licensed drug treatment or rehabilitation program. A tenured or non-tenured faculty member, or other member of the instructional staff, or member of the classified staff charged with engaging in any manner in conduct prohibited under substantive Rules 1-11 shall be entitled to be treated in accordance with applicable provisions of the Education Law or the Civil Service Law, or the applicable collective bargaining agreement, or the Bylaws or written policies of The City University of New York.

3. Any visitor, licensee, or invitee, engaging in any manner in conduct prohibited under substantive Rules 1-11 shall be subject to ejection and/or arrest by the civil authorities.

4. Any organization which authorized the conduct prohibited under substantive rules 1-11 shall have its permission to operate on campus rescinded.

Penalties 1-4 shall be in addition to any other penalty provided by law or The City University Trustees.

APPENDIX

SANCTIONS DEFINED:

A. Admonition.

An oral statement to the offender that he has violated university rules.

B. Warning.

Notice to the offender, orally or in writing, that continuation or repetition of the wrongful conduct, within a period of time stated in the warning, may cause far more severe disciplinary action.

C. Censure.

Written reprimand for violation of specified regulation, including the possibility of more severe disciplinary sanction in the event of conviction for the violation of any University regulation within a period stated in the letter of reprimand.

D. Disciplinary Probation.

Exclusion from participation in privileges or extracurricular University activities as set forth in the notice of disciplinary probation for a specified period of time.

E. Restitution.

Reimbursement for damage to or misappropriation of property. Reimbursement may take the form of appropriate service to repair or otherwise compensate for damages.

F. Suspension.

Exclusion from classes and other privileges or activities as set forth in the notice of suspension for a definite period of time.

G. Expulsion.

Termination of student status for an indefinite period. The conditions of readmission, if any is permitted, shall be stated in the order of expulsion.

H. Complaint to Civil Authorities.

I. Ejection.

A true copy of resolution adopted by the Board of Trustees of The City University of New York on June 23, 1969, as amended on October 27, 1980, May 22, 1989, and June 25, 1990.

Martin J. Warmbrand, Secretary of the Board

BAYLOR UNIVERSITY

Student Disciplinary Policy

Table of Contents

I. General
  A. General Information
  B. General Expectations of Baylor Students
  C. Standard of Proof Used in Presidential, Administrative, and Disciplinary Committee Hearings
  D. Record of the Administrative or Disciplinary Committee Hearing and Presidential Hearing
  E. Proceedings of Hearings Confidential
II. Scope of the Baylor University Student Disciplinary Policy
III. Misconduct Defined
IV. Sanctions for Misconduct
  A. Censure
  B. Reprimand
  C. Probation
  D. Restitution
  E. Eviction
  F. Suspension
  G. Expulsion
V. Authority and Responsibility for Student Discipline
  A. Vice President for Student Affairs
  B. Dean for Student Judicial Affairs
  C. Disciplinary Committee
    1. Faculty Members
    2. Student Members
VI. Purpose and Procedures for Student Disciplinary Action
  A. Preliminary Procedures
    1. Report of Charge
    2. Notice of Charge
    3. Meeting to Admit or Deny Charge and to Request Hearing
    4. Notice of Hearing
    5. Waiver of Hearing
  B. Procedures Applicable to Disciplinary Committee Hearing
    1. Disqualification
    2. Quorum
    3. Hearing Date
    4. Who May Attend
    5. The Hearing
    6. Evidence
    7. Questioning
    8. Failure to Appear
    9. Decisions of the Disciplinary Committee
    10. Summary Report
    11. Report of Decision
    12. Appeal of Decision of the Disciplinary Committee
    13. Imposition of Sanctions
    14. Appeal of Sanctions Imposed Following a Disciplinary Committee Hearing
    15. Committee Rules

C. Procedures Applicable to an Administrative Hearing
  1. Hearing Date
  2. Who May Attend
  3. The Hearing
  4. Evidence
  5. Questioning
  6. Failure to Appear
  7. Imposition of Sanctions
  8. Summary Report
  9. Referral to the Disciplinary Committee
  10. Appeal of Decision from an Administrative Hearing
  11. Appeal of Sanctions Imposed Following an Administrative Hearing
D. Procedures for Imposition of Sanctions Prior to a Hearing
  1. Situations in Which a Person May Be Sanctioned Prior to a Hearing
  2. Hearing
E. Presidential Hearing

I. General

A. General Information

Baylor University rules, regulations, and policies applicable to students are published in the student handbook and other student-related publications. Since the student handbook and other student-related publications may be revised semester to semester, it is the responsibility of the student to obtain revisions from the Division of Student Affairs. Copies of these publications and all revisions are available to all students through the Division of Student Affairs.

In all cases of the violation of University rules, regulations, and policies or in violation of local, state, federal, or international laws that affect the University, the University reserves the right to proceed with its own disciplinary action independently of governmental charges or prosecution. The University has no obligation to await the outcome of governmental prosecution before taking its own disciplinary action.

B. General Expectations of Baylor Students

Baylor University is controlled by an all-Baptist Board of Regents, operated within the Christian-oriented aims and ideals of Baptists, and affiliated with the Baptist General Convention of Texas, a cooperative association of autonomous Texas Baptist churches. It is expected that each Baylor student will conduct himself or herself in accordance with Christian principles as commonly perceived by Texas Baptists. Personal misconduct either on or off the campus by anyone connected with Baylor detracts from the Christian witness Baylor strives to present to the world and hinders full accomplishment of the mission of the University.

While attending Baylor, a student is expected to obey the laws of the United States, the State of Texas, and the City of Waco, or, if studying abroad, the laws of other countries. A student is also expected to obey the rules, regulations, and policies established by Baylor University.

It is the responsibility of the student to become familiar with this Baylor University Student Disciplinary Policy. The Division of Student Affairs attempts to ensure that the policy is communicated to all students through orientation sessions. However, the student is responsible to the University for his or her conduct that violates the Student Disciplinary Policy. Moreover, should a student witness a violation of the policy on the part of other students, it is his or her responsibility to report it to the appropriate University official.

C. Standard of Proof Used in Presidential, Administrative, and Disciplinary Committee Hearings

In an Administrative or Disciplinary Committee Hearing, the preponderance of the evidence standard of proof is used to determine whether or not the accused student has committed an act of misconduct. A *preponderance of the evidence* presented at a hearing means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in the minds of the members of the Disciplinary Committee or, in an Administrative Hearing, in the mind of the Dean for Student Judicial Affairs, belief that the alleged act of misconduct more likely occurred than not.

D. Record of the Administrative or Disciplinary Committee Hearing and Presidential Hearing

1. The tangible evidence presented at the Administrative or Disciplinary Committee Hearing or at a Presidential Hearing and the summary of the hearing constitute the Record of the Hearing.
2. The Chair of the Disciplinary Committee, the Dean for Student Judicial Affairs in an Administrative Hearing, and the President in a Presidential Hearing shall destroy the Record of the Hearing in which a decision is rendered that an act of misconduct has not been committed, unless it is believed that the circumstances of the case warrant the retention of the record for a reasonable length of time. If records are retained, they may not become a part of the student's permanent disciplinary record and they must be marked *CONFIDENTIAL* and may not be disclosed, except as permitted by the Family Rights and Privacy Act and its implementing regulations.

E. Proceedings of Hearing Confidential

The proceedings of an Administrative or Disciplinary Committee Hearing and a Presidential Hearing are confidential and are subject to the provisions of the Family Rights and Privacy Act and its implementing regulations. A member of the Disciplinary Committee who violates this rule of confidentiality may be expelled from the Disciplinary Commiittee by the President or by a majority vote of the other members of the Disciplinary Committee.

II. Scope of the Baylor University Student Disciplinary Policy

The Baylor University Student Disciplinary Policy applies to prohibited or inappropriate behavior not covered by the Baylor University Honor System or by the Baylor University Policies for Computer Usage.

III. Misconduct Defined

As used in this policy, the term *misconduct* refers to personal behavior **on or off campus** that (1) interferes with Baylor's pursuit of its educational and Christian objectives, (2) fails to exhibit a regard for the rights of others, or (3) shows disrespect for the safety of persons and property.

The following examples of misconduct are not inclusive but are intended to give a student an idea of the types of behavior that may result in disciplinary action.

A. Obstruction or disruption of teaching, research, administration, public service, or other activity or function of the University.
B. Interference with, failure to cooperate with, or failure to provide identification to any Baylor administrator, faculty member, or staff person.
C. Threats, physical abuse, or harassment directed toward a member of the Baylor faculty, staff, or student body, or toward a visitor to the campus.
D. Drunkenness or disorderly behavior.
E. Lewd or indecent behavior.

F. Expression that is inappropriate in the setting of Baylor University and in opposition to the Christian ideals which it strives to uphold.

G. Use or possession or being under the influence of an alcoholic beverage on campus or at a University-related activity. A University-related activity is any activity sponsored by the University or by any organization recognized by the University or any activity at which one or more persons represent the University or one of its recognized organizations.

H. Unlawful use, possession, purchase, distribution, sale, or manufacture of a controlled substance, designer drug, or drug paraphernalia.

I. Intentionally taking, damaging, or destroying property belonging to:

    1. the University,
    2. a visitor of the University, or
    3. a member of the University community.

J. Use or possession of firearms, explosives, fireworks, or weapons on campus without the approval of the Vice President for Student Affairs.

K. Unauthorized entry into or occupation of University facilities.

L. Falsification, alteration, fabrication, or misuse of a University form, document, record, or identification card.

M. Participation in student organizations not approved by the University.

N. Contemptuous or disrespectful behavior.

O. The giving of false testimony or other false evidence at a hearing.

P. Failure to follow established University rules, regulations, and policies.

Q. Unlawfully conducting, organizing, or participating in an activity involving a game of chance, including but not limited to casino, calcutta, or lottery.

R. Hazing or any action taken or situation created, intended to produce mental or physical discomfort, embarrassment, harassment, ridicule, or suffering. Such actions and situations include paddling; causing excessive fatigue; physical and psychological shocks; unapproved quests, treasure hunts, scavenger hunts, road trips, or other such activities; causing a person to wear, publicly, apparel that is conspicuous and not normally in good taste; engaging in public stunts and buffoonery or morally degrading or humiliating games or activities; and late work sessions and other activities not consistent with the rules, regulations, and policies of Baylor University.

S. Sexual misconduct as defined in the University's sexual misconduct policy printed elsewhere in this handbook.

T. Tampering or playing with fire extinguishers, smoke detectors, exit lights, emergency lights; tampering with or pulling under false pretenses a fire alarm; or propping stairwell fire doors open.

U. Violation of an international, federal, state, or local law or ordinance.

V. Recording or causing to be recorded the voice of a member of the University's governing board, an administrator, faculty member, staff employee, or other student without having first obtained the recorded person's express, written permission.

IV. Sanctions for Misconduct

A student who engages in misconduct is subject to one or more of the following sanctions:

A. Censure

Oral or written warning to the student that he or she is engaging in misconduct by violating University rules, regulations, or policies.

B. Reprimand

Written warning that continuation or repetition of misconduct may result in a more severe sanction.

C. Probation

Written notice explaining the serious nature of misconduct and outlining the terms of probation. It is possible for the terms of probation to prohibit a student from participation in cocurricular activities.

D. Restitution

Requirement to reimburse or otherwise compensate another for damage or loss of property resulting from a student's misconduct. Common assessment or group billing may be made to students in a residence hall for damages occurring in common areas shared by groups of residents.

E. Eviction

Probation or removal from residence halls or other campus facilities as designated in the written notification. Room fee will not be refunded to a student who is evicted from the residence halls.

F. Suspension

Termination of student status at the University for a specified period of time.

G. Expulsion

Termination of student status at the University permanently or for an indefinite period of time. A student who has been suspended or expelled will be given notification of the time within which they are expected to leave the campus after his or her relationship to the University has been terminated.

V. Authority and Responsibility for Student Discipline

A. Vice President for Student Affairs

The Vice President for Student Affairs is responsible for overall coordination of rules and regulations regarding student discipline for misconduct covered by this policy.

B. Dean for Student Judicial Affairs

The Dean for Student Judicial Affairs is the person appointed by the Vice President for Student Affairs to be primarily responsible for investigating an incident of student misconduct. If a Disciplinary Committee hearing is held, the Dean for Student Judicial Affairs presents to the committee the evidence against the accused student. The Dean for Student Judicial Affairs also conducts Administrative Hearings and, in such cases, imposes sanctions against students who are found to have engaged in misconduct.

C. Disciplinary Committee

The Disciplinary Committee is responsible for hearing the evidence relating to a charge of student misconduct brought before it and for rendering a decision based on the evidence presented. The Disciplinary Committee is composed of six faculty and three student members appointed as follows:

1. Faculty Members

(a) A Disciplinary Committee Chair appointed from the faculty by the President to a one-year term.

(b) A Disciplinary Committee Vice Chair appointed from the faculty by the President to a one-year term. The Disciplinary Committee Chair and Vice Chair may not be from the faculty of the same school.

(c) Four faculty members, one each appointed for a one-year term by the deans of the schools not represented by either the chair or the vice chair.

The faculty members of the Disciplinary Committee must be selected from the faculties of the College of Arts and Sciences, the Hankamer School of Business, the School of Education, the School of Music, the School of Nursing, and the School of Law. Faculty members serving on the Disciplinary Committee may be reappointed to successive one-year terms.

2. Student Members
   The three student members of the Disciplinary Committee are appointed by the President of the Student Body to one-year terms.

Once constituted, the Disciplinary Committee shall elect a secretary from their number.

VI. Purpose and Procedures for Student Disciplinary Action

The purpose of student disciplinary action is to determine if a student has engaged in misconduct, and, in those cases in which it is determined that the student has engaged in misconduct, to impose appropriate sanctions. Baylor University employs the following procedures in fulfilling this purpose.

A. Preliminary Procedures

1. Report of Charge
   A person wishing to report a case of misconduct shall notify the Vice President for Student Affairs. The Vice President for Student Affairs shall ask the Dean for Student Judicial Affairs to conduct an investigation of the charge.

2. Notice of Charge
   If, after an investigation, the Dean for Student Judicial Affairs determines that the University should take disciplinary action, the Dean for Student Judicial Affairs shall prepare and have delivered to the accused student a written notice of the misconduct of which the student is accused. The notice must (a) inform the student of the behavior that allegedly violates this student disciplinary policy, (b) the basis of the accusation, and (c) the student's responsibility to meet with the Dean for Student Judicial Affairs within three school days following receipt of the charge.

3. Meeting to Admit or Deny Charge and to Request Hearing
   At the meeting between the Dean for Student Judicial Affairs and the accused student, the accused student shall admit or deny the charge; but the Dean for Student Judicial Affairs shall i[illegible]nstruct the student that if the charge is admitted, no hearing will be held and the student shall sign a statement waiving a hearing. If the accused student admits that he or she has committed an act of misconduct, the Dean for Student Judicial Affairs shall impose a sanction. If the accused student denies the charge, he or she may request either an Administrative Hearing, held in accordance with Section C of this article, or a hearing before the Disciplinary Committee, held in accordance with Section B of this article.

4. Notice of Hearing
   If the accused student requests a hearing, the Dean for Student Judicial Affairs shall set the date, time, and place of the hearing and notify the accused student. Unless postponed in accordance with paragraph 8 of Section B, paragraph 6 of Section C, or Section E of this article, the hearing must be conducted within ten school days after the accused student's receipt of the charge.

5. Waiver of Hearing
   An accused student who fails to meet with the Dean for Student Judicial Affairs within three school days following receipt of notice of the charge without just reason for failing to do so waives the opportunity for a hearing. In such cases, the Dean for Student Judicial Affairs may find the accused student has committed the alleged act of misconduct and may impose sanctions against the student.

B. Procedures Applicable to Disciplinary Committee Hearings

1. Disqualification
   A member of the Disciplinary Committee shall disqualify himself or

herself if he or she feels that, in reaching a decision as to whether or not an accused student has committed an act of misconduct, he or she cannot act on the weight of the evidence without bias or prejudice. If a student member of the Disciplinary Committee disqualifies himself or herself, the President of the Student Body shall appoint a replacement. If a faculty member of the Disciplinary Committee disqualifies himself or herself, a replacement must be selected from the faculty of the school of the disqualified Disciplinary Committee faculty member by the dean of the school.

2. Quorum

A quorum for a hearing is three faculty members and one student member of the Disciplinary Committee.

3. Hearing Date

Except as provided in this Article under Section E or under paragraph 8 of this Section B, the Disciplinary Committee must meet to consider an alleged charge of misconduct within ten school days following the accused student's receipt of the charge.

4. Who May Attend

Only members of the Disciplinary Committee, the accused student, and the Dean for Student Judicial Affairs may attend the full hearing. Witnesses may be present only while giving testimony. Lawyers representing the accused student or the University and character witnesses are specifically prohibited from attending any portion of the hearing.

5. The Hearing

A hearing should be an informal give-and-take between the accused student, the Dean for Student Judicial Affairs, and the members of the Disciplinary Committee that gives the student the opportunity to characterize his or her conduct and put it in what he or she deems the proper context.

The Disciplinary Committee is presided over by the Chair of the Disciplinary Committee, or in his or her absence, the vice chair. The chair is in charge of the hearing and has broad discretion. The chair shall exercise control over the conduct of all persons participating in the hearing and direct the initial questioning to the Dean for Student Judicial Affairs and the accused student and their witnesses. The chair shall act as a hearing examiner by developing the facts and evidence necessary to enable the committee to make a decision as to whether or not an act of misconduct has been committed. In so doing, the chair may exclude irrelevant, immaterial, and unduly repetitious evidence.

The Dean for Student Judicial Affairs and the accused student shall present to the Disciplinary Committee facts and circumstances that will enable the committee to determine whether or not the accused student has committed an act of misconduct. In presenting their evidence, the Dean for Student Judicial Affairs and the accused student may ask others to present supporting testimony or documentary evidence.

In order to clarify issues, resolve inconsistencies or conflicts in testimony, or to ascertain facts, each member of the committee may ask questions of any person appearing before the Disciplinary Committee.

6. Evidence

In order to preserve the objectivity of the members of the Disciplinary Committee, no person may present evidence regarding a charge of misconduct to a member of the committee prior to a hearing. At the hearing the accused student and the Dean for Student Judicial Affairs shall present to the Disciplinary Committee any evidence, oral or written, that in the discretion of the chair might shed light on the facts and circumstances surrounding it. It is important for the Dean for Student Judicial Affairs and the accused student to offer all of their evidence at the time of the hearing. Once the hearing is concluded, the Disciplinary Committee may not consider additional evidence or testimony.

A contention by a person appearing before the Disciplinary Committee that he or she might have been able to get a witness to testify is not helpful to the Disciplinary Committee. Witnesses and evidence need to be presented at the hearing if a party wants their testimony to be considered by the Disciplinary Committee. For this reason, the Dean for Student Judicial Affairs and the accused student must attempt to bring to the hearing to testify in person each witness who has firsthand knowledge of the facts and circumstances surrounding the alleged act of misconduct. When a witness cannot be present at the hearing, the Dean for Student Judicial Affairs or the accused student may present to the committee a signed, written statement from the absent witness. Because the absent witness cannot be questioned by the other party or the members of the Disciplinary Committee, this type of evidence is given less weight.

7. Questioning
In addition to members of the Disciplinary Committee, the Dean for Student Judicial Affairs and the accused student may question the witnesses of either.

8. Failure to Appear
If the accused student fails to appear before the Disciplinary Committee on the date and at the time and place specified in the notice, the Disciplinary Committee may take the testimony and evidence from the Dean for Student Judicial Affairs and reach a decision on the basis of that evidence. Failure of the accused student to appear and offer evidence may leave the Disciplinary Committee little choice but to decide that the student has engaged in misconduct based on the evidence and testimony presented by the Dean for Student Judicial Affairs. If either the Dean for Student Judicial Affairs or the accused student is unable to appear before the Disciplinary Committee on the date specified in the notice, he or she should notify the Chair of the Disciplinary Committee of the reasons that prevent his or her attendance as scheduled. If the Disciplinary Committee determines that good cause exists for the party not appearing at the hearing when scheduled, they shall set a new date for the hearing.

9. Decision of the Disciplinary Committee
After the hearing is concluded, the chair shall excuse the accused student and the Dean for Student Judicial Affairs from the Disciplinary Committee meeting. The Disciplinary Committee shall then discuss the evidence presented during the hearing. The chair shall then poll the members of the Disciplinary Committee by secret ballot on the question of whether or not a preponderance of the evidence supports the allegation that the accused student committed an act of misconduct. If a majority of the Disciplinary Committee votes that a preponderance of the evidence supports the allegation, the Disciplinary Committee shall render a decision that the accused student has committed the alleged act of misconduct. If less than a majority of the Disciplinary

Committee votes that a preponderance of the evidence supports the allegation, the Disciplinary Committee shall render a decision that the accused student did not commit an act of misconduct. The decision of the Disciplinary Committee as to whether or not an act of misconduct was committed is final, unless the President finds that there is substantial evidence that the decision of the Disciplinary Committee was arbitrary and capricious.

10. Summary Report

The Secretary of the Disciplinary Committee shall prepare a typewritten summary of the hearing, including the decision of the Disciplinary Committee. The report of a Disciplinary Committee Hearing shall be reviewed by the Disciplinary Committee members who shall indicate their approval of it by signing it.

11. Report of Decision

The Chair of the Disciplinary Committee shall report the decision of the Disciplinary Committee to the Vice President for Student Affairs and the accused student. If the decision of the Disciplinary Committee is that an act of misconduct has occurred, the Chair of the Disciplinary Committee shall deliver to the Vice President for Student Affairs the record of the hearing, along with recommended sanction, if any.

12. Appeal of Decision of the Disciplinary Committee

If the accused student believes that there is substantial evidence that the decision rendered in a Disciplinary Committee Hearing was arbitrary or capricious, he or she may appeal to the Vice President for Student Affairs.

The Vice President for Student Affairs shall review the record of the hearing and the evidence presented by the person appealing the decision. The vice president shall determine whether or not substantial evidence exists to support the allegation that the decision rendered as a result of the Disciplinary Committee was reached in an arbitrary and capricious manner.

If the vice president finds substantial evidence exists that the decision rendered as a result of the Disciplinary Committee hearing was arbitrary and capricious, he or she shall reverse the decision. Otherwise, the vice president shall affirm the decision.

13. Imposition of Sanctions

The Vice President for Student Affairs shall impose an appropriate sanction against a student whom the Student Disciplinary Committee has found to have committed an act of misconduct. The vice president may consider the recommendation, if any, of the Student Disciplinary Committee. In determining an appropriate sanction, the vice president may review the Record of the Hearing and the student's academic and disciplinary records. Other factors that may be considered include whether or not the student admits his or her wrongdoing, the student's attitude upon being found guilty, and the nature and weight of the evidence presented. The Vice President for Student Affairs may impose any reasonable sanction he or she deems appropriate; but if the vice president feels that suspension or expulsion is the appropriate sanction for the act of misconduct, he or she shall first confer with the Committee of Vice Presidents composed of the Vice Presidents for Academic, Administrative, and External Affairs before imposing such a sanction.

In the absence or inability of the Vice President for Student Affairs, the person designated by the vice president to serve in his or her absence or disability shall carry out the responsibilities assigned to the vice president in this policy.

14. Appeal of Sanctions Imposed Following a Disciplinary Committee Hearing

A student against whom sanctions have been imposed by the Vice President for Student Affairs for committing an act of misconduct may, if he or she feels that the sanctions are inappropriate, ask the Committee of Vice Presidents, composed of the Vice Presidents for Academic, Administrative, and External Affairs, to modify or suspend the sanctions; and the committee shall consider the request. If the student is dissatisfied with the response of the Committee of Vice Presidents, he or she may ask the President to consider the request. In such a situation, the President shall review the Record of the Hearing and confer with the Committee of Vice Presidents and the Vice President for Student Affairs and, based upon this review, decide to:

A. Let the sanction stand;
B. Modify the sanction or impose a different sanction; or
C. Suspend the sanction.

The decision of the President is final.

When immediate sanctions have been imposed against a student pursuant to Section D of Article VI of this policy, the Committee of Vice Presidents and the President may not consider an appeal of the sanction until a hearing has been held and a decision has been rendered.

15. Committee Rules

The Disciplinary Committee may adopt specific procedural rules for hearings, provided such rules are not inconsistent with this policy. These rules may provide for the recess of a hearing, in order to allow the parties to obtain additional witnesses or evidence.

C. Procedures Applicable to Administrative Hearings

1. Hearing Date

Except as provided in this Article under Section D or under paragraph 6 of this Section C, an Administrative Hearing, if requested by an accused student, must be held within ten school days following the accused student's receipt of the charge.

2. Who May Attend

Only the Dean for Student Judicial Affairs and the accused student may attend the full hearing. Witnesses may be present only while giving testimony. Lawyers representing the accused student or the University and character witnesses are specifically prohibited from attending any portion of the hearing.

3. The Hearing

The Dean for Student Judicial Affairs shall exercise control over the conduct of all persons participating in an Administrative Hearing and shall question the accused student and their witnesses. The Dean for Student Judicial Affairs shall act as a hearing examiner by developing the facts and evidence necessary to make a decision as to whether or not an act of misconduct has been committed.

The accused student shall present to the Dean for Student Judicial Affairs facts and circumstances that will enable the dean to determine whether or not the accused student has committed an act of misconduct. In presenting his or her position, the accused student may ask others to present supporting testimony or documentary evidence.

4. Evidence

At the hearing the accused student shall present to the Dean for Student Judicial Affairs any evidence, oral or written, that, in the discretion of the dean, is pertinent to the charge or that sheds light on the facts and circumstances surrounding it.

It is important for the accused student to offer all of his or her evidence at the time of the hearing. Once the hearing is concluded, the Dean for Student Judicial Affairs may not consider additional evidence or testimony.

Witnesses and evidence need to be presented at the hearing if a party wants them to be considered. For this reason, the accused student must attempt to bring to the hearing to testify in person a witness who has firsthand knowledge of the facts and circumstances surrounding the alleged act of misconduct. When a witness cannot be present at the hearing, the accused student may present to the Dean for Student Judicial Affairs a signed, written statement from the absent witness. Because the absent witness cannot be questioned, this type of evidence is given less weight.

5. Questioning

In addition to the Dean for Student Judicial Affairs, the accused student may question the witness.

6. Failure to Appear

If the accused student fails to appear at the hearing on the date and at the time and place specified in the notice, the Dean for Student Judicial Affairs may take the testimony and evidence from the witnesses who do appear and reach a decision on the basis of that evidence. Failure to appear and offer evidence may leave the Dean for Student Judicial Affairs little choice but to decide that an act of misconduct has occurred. If the accused student is unable to appear at the hearing on the date specified in the notice, he or she should notify the Dean for Student Judicial Affairs of the reasons that prevent his or her attendance as scheduled. If the dean determines that good cause exists for not appearing at the hearing when scheduled, the dean shall set a new date for the hearing.

7. Imposition of Sanctions

The Dean for Student Judicial Affairs shall impose an appropriate sanction against a student who is found through an Administrative Hearing to have committed an act of misconduct. In determining an appropriate sanction, the Dean for Student Judicial Affairs may review the student's academic and disciplinary records. Other factors that may be considered include whether or not the student admits his or her wrongdoing, the student's attitude upon being found guilty, and the nature and weight of the evidence presented at the hearing. The Dean for Student Judicial Affairs may impose any reasonable sanction he or she deems appropriate; but if the Dean for Student Judicial Affairs feels that suspension or expulsion is the appropriate sanction for the act of misconduct, he or she shall first confer with the Vice President for Student Affairs before imposing such a sanction.

8. Summary Report

The Dean for Student Judicial Affairs shall prepare a typewritten summary of the Administrative Hearing, including his or her decision.

9. Referral to the Disciplinary Committee

If in the course of conducting an Administrative Hearing, the Dean for Student Judicial Affairs determines that a hearing before the

Disciplinary Committee would be more appropriate, he or she may refer the charge to the Disciplinary Committee. In such a case, the Disciplinary Committee shall meet within ten days of the referral to consider the alleged charge of misconduct.

10. Appeal of Decision from an Administrative Hearing
    a. If the accused student believes that there is substantial evidence that the decision rendered by the Dean for Student Judicial Affairs in an Administrative Hearing was arbitrary or capricious, he or she may appeal to the Vice President for Student Affairs, whose decision is final.
    b. The Vice President for Student Affairs or his or her designee shall review the record of the hearing and the evidence presented by the person appealing the decision. The vice president shall determine whether or not substantial evidence exists to support the allegation that the decision rendered as a result of the Administrative Hearing was reached in an arbitrary and capricious manner.
    c. If the Vice President for Student Affairs finds substantial evidence exists that the decision rendered as a result of the Administrative Hearing was arbitrary and capricious, he or she shall reverse the decision. Otherwise, the Vice President for Student Affairs shall affirm the decision.
11. Appeal of Sanctions Imposed Following an Administrative Hearing

    A student against whom sanctions have been imposed for committing an act of misconduct may, if he or she feels that the sanctions are inappropriate, ask the Vice President for Student Affairs to modify or suspend the sanctions; and the Vice President for Student Affairs shall consider the request. If the student is dissatisfied with the response of the Vice President for Student Affairs, he or she may ask the President to consider the request. In such a situation, the President shall review the Record of the Hearing and confer with the Vice President for Student Affairs and, based upon this review, decide to:

    A. Let the sanction stand;
    B. Modify the sanction or impose a different sanction; or
    C. Suspend the sanction.

    The decision of the President is final.

    When immediate sanctions have been imposed against a student pursuant to Section D of Article VI of this policy, the Vice President for Student Affairs and the President may not consider an appeal of the sanction until a hearing has been held and a decision has been rendered.

D. Procedures for Imposition of Sanctions Prior to a Hearing
   1. Situations in Which a Person May Be Sanctioned Prior to a Hearing

      The University may, subject to a subsequent Administrative or Disciplinary Committee Hearing or a Presidential Hearing, impose immediate sanctions against a student, including the sanction of suspension, if—

      a. the student is arrested for a criminal offense constituting a felony or a Class A misdemeanor; or
      b. in the sole opinion of the Vice President for Student Affairs, the student's continued presence on the campus might—
         (i) create a danger of physical or mental harm to the student or another person; or
         (ii) disrupt the educational process of the University.

2. Hearing
   A hearing subsequent to the imposition of immediate sanctions pursuant to this Section D must be conducted in accordance with the provisions of Section B, C, or E of this article.

E. Presidential Hearing

When the President, in the President's sole discretion, determines that a student has committed an act of misconduct that is so grievous that the reputation of the University may be damaged as a result, the President may convene a hearing with the accused student and may, based upon the evidence elicited at the hearing, impose sanctions against the student.

The President shall give the accused student appropriate notice of the alleged misconduct, the date, time and place of the hearing, and such other procedural information as deemed appropriate by the President.

In such cases, Article V and Paragraphs A, B, and C of Article VI of this policy do not apply. At the hearing, the accused student will be given the opportunity to characterize his or her conduct and put it in what he or she deems the proper context. Based upon the evidence and testimony presented at the hearing, the President shall decide if the student is guilty of misconduct, and if so, he or she shall impose an appropriate sanction. The decision of the President is final.

Columbia University

Rules of University Conduct

(Chapter XLI of the Statutes of the University)

Rules of University Conduct

The Rules Of University Conduct (Chapter XLI of the Statutes of the University) provide special disciplinary rules applicable to demonstrations, rallies, picketing and the circulation of petitions. These rules are designed to protect the rights of free expression through peaceful demonstration while at the same time ensuring the proper functioning of the University and the protection of the rights of those who may be affected by such demonstrations.

The Rules of University Conduct are University-wide and supersede all other rules of any school or division. Minor violations of the Rules of Conduct are referred to the normal disciplinary procedures of each school or division ("Dean's discipline"). A student who is charged with a serious violation of the Rules has the option of choosing Dean's discipline or a more formal procedure provided in the Rules.

All University faculty, students and staff are responsible for compliance with the Rules of University Conduct. The text of the Rules of University Conduct is reproduced below.

Chapter XLI

§410. DEMONSTRATIONS, RALLIES, AND PICKETING.

Demonstrations, rallies, picketing, and the circulation of petitions have an important place in the life of a university. They are means by which protests may be registered and attention drawn to new directions possible in the evolution of the University community. But, in order to protect the rights of all members of the University community and to ensure the proper functioning of the University as an institution of teaching and research, it is necessary to impose reasonable restraints on the place and manner in which picketing and other demonstrations are conducted and on activities of counter demonstrators or self-appointed vigilantes. This is the intention of the Rules of University Conduct: to protect the concurrent rights of both the University community as a whole and demonstrators.

While the University as a private institution is not subject to the Constitutional provisions on free speech and due process of law, the University by its nature is dedicated to the free expression of ideas and to even-handed and fair dealing with all with whom it conducts its affairs. The Rules of University Conduct are thus enacted by the University to provide as a matter of University policy the maximum freedom of expression consistent with the rights of others and a fair and speedy hearing to any person charged with a violation of these Rules.

A violation of these Rules is an offense against the entire University community. However, such violations are not here considered as crimes and University disciplines should not carry the same stigma as a criminal conviction. All members of the University community are assumed to be innocent until proven guilty of a violation of the Rules. The University shall publicize the existence of the Rules and make them readily available to persons who may be affected by them. Such persons are responsible for being aware of all provisions contained in the Rules.

§411. DEFINITIONS.

Terms used in this Chapter XLI shall have the following meanings: (Comment: While gender-neutral language is employed in these Rules whenever possible, "he," "him," or "his" occasionally appear. They are used to avoid awkward locutions and are not intended to perpetuate gender stereotypes.)

a. *University* means Columbia University in the City of New York.

b. *University facility* means that place where a University function occurs.

c. *University function* means any charter or statutory operation or activity of the University, including instruction, research, study, administration, habitation, social life, space allocation and control, food supply, and other functions directly related thereto. Specifically included are both functions of fixed-time duration (e.g., classes, examinations, lectures, etc.) and functions of continuing duration (e.g., the operation of libraries, research laboratories, maintenance shops, computers, business offices, etc.). Also included are functions ancillary to directly educational purposes such as meetings, disciplinary proceedings, and athletic and social events sponsored by any University-approved organization.

d. *Deans* mean persons appointed by the President, and approved by the Trustees, either as Dean, Acting Dean, or Director of one of the divisions or schools of the Columbia Corporation, or such staff persons as they may assign to administer disciplinary affairs.

e. *Delegates.* A "presidential delegate" is appointed by the President and a "divisional delegate" is appointed by the Dean or Director of a division or school. Delegates have principle authority for the enforcement of these Rules. They shall warn individuals and groups whose actions may violate these Rules and may declare their belief that the demonstration is illegal under Sections 413a (18), (19), and (20). They shall, when facts known to them or brought to their attention warrant, file a complaint with the Rules Administrator against alleged violators.

f. *Dean's discipline* means in the case of students the normal disciplinary procedure of a School or Division that would ordinarily apply but for these Rules; in the case of faculty and staff, Dean's discipline means the normal disciplinary procedure that would ordinarily apply but for these Rules.

g. *Day* means a calendar day, regardless of whether the University is in academic session except for purposes of the appeal procedures set forth in Section 418. Whenever any time limit expires on a nonworking day, it shall be extended to the next working day.

h. *Students* mean any persons registered in any division of the University, whether for courses or research, and whether or not they are candidates for a degree or certificate. It also includes persons who are on leave or suspended or continuing matriculants for any degree or certificate. It includes persons registered during any preceding terms and who have not since that time earned the degree or certificate or withdrawn from the University.

i. *Faculty* means officers of instruction or research appointed to any division, school, or other department of the University, including officers on leave.

j. *Staff* means members of the administration, administrative staff, research staff, library staff, or supporting staff.

k. *Violation* means the commission of an act proscribed by these Rules. However, inadvertent or accidental behavior shall not be considered to be the substance of a violation.

l. *Sanctions* comprise the following penalties for violation of these Rules.

(1) *Disciplinary Warning.* A disciplinary warning states that future violations will be treated more seriously. It in no way limits consideration for, or receipt of, financial aid or compensation for which the individual may be eligible. The period of warning shall be for not less than the remainder of the term in which the warning occurs nor for more than three regular terms, including the term in which the warning occurs. Upon notification by the proper authority, there shall be entered on the individual's transcript or personal record the notation: "Disciplinary Warning, from (date) to (date)." This notation is removed when the disciplinary warning has been terminated.

(2) *Censure.* In addition to the provisions listed under disciplinary warning, censure remains on students' records until completion of the degree or certificate for which they are candidates. For faculty and staff this notation remains on the record for a maximum of four years. It in no way limits consideration for, or receipt of, financial aid or compensation for which the individual may be eligible. Subsequent conviction for a *simple* offense requires suspension for a semester or dismissal from the University; subsequent conviction for a *serious* offense requires dismissal from the University.

(3) *Suspension.* Individuals who have been suspended are not permitted to continue their association with the University or reside in one of the University residence halls during the period of suspension, nor may they receive a leave of absence of any kind. The period of suspension shall be for not less than one regular term nor for more than three regular terms, not counting the summer session but including the term in which the suspension occurs. The period of suspension shall be determined by the Hearing Officer; it may not be adjusted except under the appropriate procedures set forth in these Rules or by an act of presidential clemency. Upon notification by the proper authority, there shall be entered on the individual's record the notation: "Suspended, from (date) to (date)." Upon termination of the period of suspension, the individual may apply for reinstatement. The notation on the record is permanent.

(4) *Dismissal.* Unlike suspension, when an individual is dismissed no time period is specified nor is reinstatement anticipated, but in no case shall reinstatement occur less than one year after the imposition of the sanction except by act of presidential clemency. Upon notification by the proper authority, there shall be entered on the individual's record the notation: "Dismissed, (date)." Should the individual be subsequently readmitted or re-employed, upon notification from the proper authority, there shall be entered on the individual's record the notation: "Readmitted or re-employed (date)." The notations on the record are permanent.

m. *Respondent* means a person against whom a charge for violation of these Rules has been filed.

n. *Rules Administrator* means the Rules Administrator appointed under §41 5b.

o. *Hearing Officer* means a Hearing Officer appointed under §415d.

p. *University Judicial Board* means the appellate review board appointed under §415e.

§412. JURISDICTION.

The Rules of University Conduct shall apply to all members of the University community: administrators, administrative staff, research staff, library staff, supporting staff, faculty, and students. Also visitors, licensees, and invites on a University facility shall be subject to the Rules of University Conduct. Violations by such persons may result in the revocation of their invitation or license to be on a University facility.

and their subsequent ejection.

The Rules of University Conduct apply to any demonstration, including a rally or picketing, that takes place on or at a University facility. Such facilities include, but are not limited to, all University campuses, research laboratories, maintenance shops, business offices, athletic fields, dormitories, classrooms and meetings halls. The Rules of University Conduct do not apply to participation in a demonstration, including a rally or picketing, by full-time employees of the University represented by a collective bargaining agent, where the demonstration arises in the course of or is incident to a labor dispute involving the University.

§413. VIOLATIONS AND SANCTIONS.

a. *Violations.* A person is in violation of these Rules when such person individually or with a group, incident to a demonstration, including a rally or picketing:

(1) (simple violation) Engages in conduct which places another in danger of bodily harm.

(2) (serious violation) Causes or clearly attempts to cause physical injury to another person.

(3) (simple) Uses words which threaten bodily harm in a situation where there is clear and present danger of such bodily harm.

(4) (serious) Uses words in a situation of clear and present danger which actually incite others to behavior which would violate Sections 413a (2) or (6).

(5) (simple) Causes minor property damage or loss, or endangers property on a University facility.

(6) (serious) Misappropriates, damages, or destroys books or scholarly material or any other property belonging to the University or to another party, when that property is in or on a University facility, and by such action causes or threatens substantial educational, administrative, or financial loss.

(7) (simple) Interferes over a very short period of time with entrance to, exit from, passage within, or use of, a University facility but does not substantially disrupt any University function.

(8) (serious) Continues for more than a very short period of time to physically prevent, or clearly attempt to prevent, passage within, or unimpeded use of, a University facility, and thereby interferes with the normal conduct of a University function.

(9) (serious) Enters or remains in a University facility without authorization at a time after the facility has been declared closed by the University. (Comment: The University shall make all reasonable attempts to publicize this declaration to the fullest extent possible.)

(10) (simple) Enters a private office without authorization.

(11) (serious) Holds or occupies a private office for his own purposes. (Comment: Persons may not enter a private office unless invited and then not in excess of the number designated or invited by the occupant. Anyone so entering must leave on request of a recognized occupant of such office or on request of another authorized person. Passage through reception areas leading to private offices must not be obstructed. Clear and unimpeded passageway through lobbies, corridors and stairways must be maintained at all times.

For this purpose, the delegate may advise demonstrators as to the permissible number of participants in such restricted areas and regulate the location of such participants. Persons may use rooms in which instruction, research, or study normally take place only when such rooms are assigned to them through established University procedures.)

(12) (simple) Causes a noise which substantially hinders others in their normal academic activities.

(13) (simple) Briefly interrupts a University function.

(14) (serious) Disrupts a University function or renders its continuation impossible.

(15) (serious) Illicitly uses, or attempts to use, or makes threats with a firearm, explosive, dangerous or noxious chemical, or other dangerous instrument or weapon.

(16) (simple) Fails to self-identify when requested to do so by a properly identified delegate.

(17) (serious) Prevents a properly identified delegate from the discharge of his official responsibilities under these Rules, except through a mere refusal to self-identify.

(18) (simple) Fails to obey the reasonable orders of a properly identified delegate regulating the location of demonstrators or others within the vicinity of a demonstration to assure unimpeded access to or use of a facility or to avoid physical conflict between demonstrators and others. (Comment: This Regulation gives the delegate authority to regulate assemblies. The check against abuse of such authority is provided by the test of reasonableness imposed by the Hearing Officer in such disciplinary proceedings as may result from noncompliance. Should a delegate in the exercise of discretion fail to disperse an assembly in which some or all of the participants are violating or have violated the Rules, this should in no way be construed as excusing the violators, who remain liable for their acts under these Rules.)

(19) (simple) Fails to disperse from an assembly upon order of a properly identified delegate when such order results from repeated or continuing violations of these Rules by members of the Assembly and the delegate has by verbal directions made reasonable effort to secure compliance before ordering dispersal.

(20) (serious) Fails to disperse from an assembly upon order of a properly identified delegate when such order results from serious violations of these Rules by members of the assembly and the delegate so states in his order to disperse.

(21) (simple) Aids and abets others or other groups in a simple violation of these Rules.

(22) (serious) Aids and abets others or other groups in a serious violation of these Rules.

b. *Reserve Clause.* Disciplinary matters not specifically enumerated in these Rules are reserved in the case of students to the Deans of their schools or their delegated authorities and to the regulations and mechanisms they have established, and in the case of faculty and staff to the President of the University or his delegated authority and to the regulations and mechanisms that have been established to deal with such matters.

c. Sanctions.

(1) A respondent who is found guilty of a *simple* violation of these Rules shall be sanctioned by: Disciplinary Warning or Censure. Censure is the most severe penalty that may be imposed

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for a *simple* violation.

(a) For repeated violations of a *simple* nature, or for a *simple* violation by a respondent already on Disciplinary Warning, the respondent shall be subject to Censure or Suspension; if already under Censure, the respondent shall be subject to Suspension. In especially extreme cases, Dismissal may be imposed.

(2) A respondent who is found guilty of a serious violation of these Rules shall be sanctioned by: Censure, Suspension, or Dismissal.

§414. ENFORCEMENT.

a. *Summoning a Delegate.* Should any member of the University community believe that participants in an assembly or other demonstration are violating the Rules of University Conduct, he or she should notify the appropriate delegate(s) by calling the Security Office. The delegates shall proceed to the site of the demonstration and gather information for possible transmission to the Rules Administrator. This includes the identities of any participants who the delegate feels are violating the Rules, and the facts surrounding the demonstration.

b. *Warning and Advice.* Properly identified delegates shall warn those parties whose actions they consider to be in violation of these Rules. However, a member of the University community may be charged with a violation of these Rules even if no prior warning has been given or perceived. The Hearing Officer (or Dean or other person conducting the proceedings in the case of Dean's Discipline) shall in either case determine whether the actions of the accused were in violation of these Rules.

c. *Creating Separate Areas for Demonstrations Believed to be in Violation of These Rules and for Permissible Demonstrations/Observation.* Delegates believing that an assembly or other demonstration is violating Sections 413a(7), (8), (9), or (14) of these Rules should, to the extent practicable in their sole judgment, immediately make all reasonable efforts to create separate areas for demonstrators whose actions are believed to violate the Rules and for those wishing to demonstrate permissibly or to observe. There should be a reasonable distance between these areas, with a presumption in favor of allowing unobstructed view and observation, and they should be graphically delineated without creating barriers to the extent feasible. Failure by a delegate to create these areas shall not excuse a violation of these Rules.

d. *Distribution of a Flier Conveying Pertinent Information to Demonstrators and Observers.* Whenever an assembly or other demonstration believed to be in violation of these Rules continues for more than a very short period of time, the Presidential Delegate shall consider preparing a flier for distribution to persons in the area of the demonstration. The flier should repeat any previous warning by a delegate concerning the violation or violations of these Rules that are believed to be taking place, describe the location of any areas cordoned off under Section 414c, and identify the locations where full copies of these Rules are available. Failure by the Presidential Delegate to prepare and distribute such a flier shall not excuse a violation of these Rules.

e. *Self-identifying.* A properly identified delegate may request individuals believed to be violating these Rules to identify themselves through production of their University I.D. cards. Their cards will be returned immediately after the delegate has recorded the individual's name and I.D. number. Members of the University community who do not self-identify may be charged with serious violation of these Rules under Section 413a(16).

f. *Treatment of Outsiders.* In accordance with the jurisdiction of these Rules (Section 412), any visitor, licensee or invite whom the delegate determines is violating these Rules, and who does not comply with the delegate's warning and advice, may be ejected from a University facility without regard to the procedures set forth in Sections 416-418 herein.

g. Delegates also have a responsibility to protect the rights of lawful demonstrators. Counter-demonstrators or vigilantes may be warned by delegates if they consider their actions to be in violation of the Rules. The same procedure of information gathering shall be initiated by delegates for all suspected violators. Members of the University community should not take enforcement of these Rules into their own hands, since such action may result in violations of these Rules.

h. If the President, upon consultation with a majority of a panel established by the Executive Committee of the University Senate, decides that a demonstration poses a clear and present danger to persons, property, or the substantial functioning of any division of the University, he shall take all necessary steps to secure the cooperation of external authority to bring about the end of the disruption. The President shall make public his decision to the fullest extent possible as soon as it is feasible. Nothing in the above shall be construed to limit the President's emergency authority to protect persons or property.

§415. ADMINISTRATIVE AND JUDICIAL PERSONNEL.

a. *The Delegate.*

(1) The Dean or Director of each division or school shall appoint one or more divisional delegates.

(2) Divisional delegates may be called upon to enforce these Rules by anyone subject to them, or they may proceed to enforce them on their own initiative.

(3) Whenever feasible, a divisional delegate is obliged, upon request of another delegate, to assist that delegate.

(4) There shall be one or more presidential delegates who shall have the powers and responsibilities of divisional delegates, but who shall, in addition, be kept informed of all actions and charges undertaken by the divisional delegates.

b. *Rules Administrator.* The Rules Administrator, whose office shall be in the University Senate offices, shall have primary responsibility for the administration of these Rules. He shall maintain and have custody of the records of proceedings under these rules; shall prepare and serve notices and other documents required under these rules, shall accept and investigate complaints, file charges, organize informal settlements and present evidence in support of charges to the Hearing Officer. The Rules Administrator shall be appointed by the President after consultation with the Executive Committee of the University Senate and shall serve at the pleasure of the President. The Rules Administrator may appoint one or more Assistant Administrators, who may act in his stead. Persons otherwise concerned with the disciplinary procedures of a particular school or division may not be appointed as the Rules Administrator or an Assistant Administrator.

c. *Deans and Supervisors.* The Dean of a School or Division or the Dean's designee shall hear all charges of simple violations of these Rules brought against students of that School or Division, applying the substantive law of these Rules (including sanctions) in accordance with the procedure for Dean's Discipline of the School or Division. Charges of simple violations of these Rules brought against faculty and staff shall be heard by the respondent's supervisor or other person who would normally conduct disciplinary proceeding against the respondent but for these Rules, applying the substantive law of these Rules (including sanctions) in accordance with the procedure of the Dean's Discipline applicable to the respondent.

d. *Hearing Officer.* The Executive Committee of the University Senate shall at its first meeting each year appoint or fill vacancies in a panel of not less than three Hearing Officers, each of whom shall serve for a term of two years. It shall also designate the order in which persons on the panel shall serve as Hearing Officers. A Hearing Officer shall conduct hearings on charges of a serious violation of these Rules. Hearing Officers shall be lawyers appointed from without the University, and shall be chosen for their professional competence and experience in the conduct of hearings. A person with a full- or part-time affiliation with the University as faculty, student or staff shall be considered from within the University for the purposes of these Rules; a person whose only direct affiliation is as an alumnus shall be considered from without the University. The Executive Committee of the University Senate may appoint additional persons to the panel of Hearing Officers should the need arise. Persons otherwise concerned with disciplinary procedures may not be appointed as Hearing Officers.

e. *University Judicial Board.* The Executive Committee of the University Senate shall at its first meeting each year appoint or fill vacancies in a University Judicial Board consisting of five members, one of whom shall be a student, one of whom shall be a faculty member, and one of whom shall be from administration, administrative staff, research staff or library staff. The Executive Committee shall designate the Chairman of the Board, and shall make appointments to the Board, which shall ordinarily be for a term of three years, so as to provide for staggered terms to ensure continuity in the Board. The members of the University Judicial Board shall be persons from within the University, and no person otherwise concerned with disciplinary procedures may be appointed to the board.

§416. PRE-HEARING PROCEDURES.

a. *Filing Complaints.* Any member of the University who believes a violation of the Rules has been committed may file a written complaint with the Rules Administrator. The complaint shall state with particularity the person(s) involved, the nature of the offense and the circumstances under which the offense may have been committed.

b. *Investigation of Complaints.* Upon receipt of a complaint, the Rules Administrator, after such investigation as he deems advisable, shall determine whether there is reasonable cause to believe an offense has been committed. The Administrator may interview any person, including a prospective respondent.

c. *Complaints Dismissed.* If the Rules Administrator determines that there is no reasonable cause to believe an offense has been committed, he shall so inform the complainant.

d. *Informal Settlements; Charges Filed.* If the Rules Administrator determines that there is reasonable cause to believe an offense has been committed, such administrator shall interview the prospective respondent(s). The Rules Administrator shall notify the respondent(s), during the interview, of the substance of the charges which may be filed. On the basis of the complaint investigation and the interview, the rules Administrator shall:

1. attempt an informal settlement of the matter with the respondent(s), either alone or in conjunction with the Dean(s) of such respondent(s)' division(s); with the written consent of the respondent, the Rules Administrator may accept an admission of guilt of a simple or a serious violation and impose the sanction the Rules Administrator deems appropriate, without the necessity of formally filing charges, or

2. prepare charges for filing. The charges shall be in writing, stating with particularity the offense alleged, and shall charge one or more simple violations or one or more serious violations; the charges may not include both simple and serious violations against any one respondent based on the same conduct (similar conduct occurring at clearly different times is not considered "same conduct"); in case of serious violation, the charges shall state the witnesses likely to be called in support of the charges. The Rules Administrator may file charges against a prospective respondent who has attempted and failed to achieve informal settlement with the appropriate Dean or with the Rules Administrator.

e. *Duties of the Rules Administrator After Deciding to Prepare Charges.* Promptly after deciding to prepare charges of a violation of the Rules, the Rules Administrator shall either:

1. in the case of charges of a simple violation (subject to Section 416h), file the charges with the respondent's Dean or supervisor (or other person referred to in Section 415c), as the case may be, sending a copy by hand delivery to the respondent's campus address or by hand delivery or regular mail if the respondent has an off-campus address, or

2. in case of charges of a serious violation,

(i) notify the Hearing Officer next available to serve in the order designated by the Senate Executive Committee as provided in Section 415d.

(ii) in consultation with the Hearing Officer, set a time and place for a hearing. The hearing may not be held less than 10 days after notice is given to the respondent.

(iii) file the charges with the Hearing Officer.

(iv) give notice to the respondent by hand delivery or by registered mail.

Notice shall be considered given when delivered or, if mailed, five days after being deposited in the mail. The notice shall include:

A. a copy of the charge;

B. the name of the Hearing Officer;

C. the time and place of the hearing;

D. a copy of these Rules; and

E. any other information the Rules Administrator thinks relevant. f. *Procedural Motions Prior to* the

Hearing on Charges of a Serious Violation. Not less than five days prior to the hearing, the Rules Administrator and the respondent may each file with the Hearing Officer, in writing and stating the reasons therefore, the following procedural motions:

(A) motion to postpone the hearing

(B) motion to consolidate this hearing with that of another respondent

(C) motion to sever this hearing from that of another respondent

(D) motion to dismiss the charges.

The Hearing Officer shall decide whether to grant a motion set forth in (A) - (D) above and shall communicate his decision to the Administrator and to the respondent. Not less than two days prior to the hearing the respondent may file with the Hearing Officer a request for a closed hearing. The Hearing Officer shall automatically grant such a request. The Hearing Officer may in his discretion receive and rule upon other pre-hearing motions.

g. *Respondent's Right to an Advisor.* A respondent may be assisted in his or her defense of charges of serious violation by an advisor of his or her choice from within or without the University; the adviser may be a lawyer. In the case of charges of a simple violation, the respondent may be assisted by an advisor only to the extent provided under the procedure of the relevant Dean's Discipline.

h. *Procedure for Charges of a Simple Violation by a Respondent Under Censure.* Charges of a simple violation brought against a respondent for conduct while under Censure (where a finding of guilty requires the sanction of suspension) shall not be heard under Dean's Discipline but shall be filed with a Hearing Officer and treated for all procedural purposes as if they were charges of a serious violation. If a respondent is found guilty of a simple violation under Dean's Discipline for conduct not while under Censure, only the sanction of Disciplinary Warning or Censure may be imposed; any prior discipline for an offense not related to these Rules shall not be taken into account. Multiple charges of simple violations against a respondent for conduct while not under Censure shall be heard under Dean's Discipline as herein provided, and the Dean or other person imposing a sanction after one or more findings of guilty may impose only the sanction of Disciplinary Warning or Censure.

i. *Interview of a Respondent Under Dean's Discipline.* Notwithstanding anything to the contrary in the procedures of the Dean's Discipline applicable to a particular respondent, in the case of charges of a simple violation of these Rules to be heard under Dean's Discipline, the Dean or other person conducting the proceeding shall schedule an interview with the respondent, such scheduling to occur within 48 hours of the filing of the charges by the Rules Administrator. At the interview the respondent shall be informed of the evidence against him or her and shall have the opportunity to be heard in his or her defense. Failure to attend the interview unless excused for cause may be taken into account in considering the charges against the respondent.

§417. THE HEARING ON CHARGES OF A SERIOUS VIOLATION.

a. *Presentation by the Rules Administrator.* The Rules Administrator, who may be assisted by a lawyer from within or without the University, shall produce all evidence and call all witnesses in support of the charges. The respondent and his advisor may examine any evidence and cross-examine any witness.

b. *Presentation by the Respondent.* Following presentation by the Rules Administrator, the respondent and his advisor may produce evidence and call witnesses in his defense. The Rules Administrator may examine any evidence and cross-examine any witness.

c. *Role of the Hearing Officer.* The Hearing Officer shall have broad discretion in the conduct of the pre-hearing procedures and the hearing, subject only to the express provisions of these Rules and to the principle that these Rules are Intended to provide to the respondent a speedy and a fair hearing. The Hearing Officer will normally rely primarily on the Rules Administrator and the respondent and his advisor to present the case for and against the charges, but the Hearing Officer on his motion may call and examine witnesses and invite the submission of additional evidence.

d. *Record of the Hearing.* The Hearing Officer shall provide for a verbatim record of the hearing, which may be by court reporter, tape recording or such other means as the Hearing Officer shall determine. Unless the hearing has been closed at the request of the respondent, the verbatim record of the hearing shall be a public record.

e. *Open Hearing.* Unless a closed hearing is requested by the respondent, the hearing shall be open to members of the University community and to the University news media, except that the Hearing Officer may impose reasonable limits on the number of persons admitted, may exclude witnesses from attendance at the hearing and may close the hearing as provided in §417g if it is disrupted by disorderly behavior of the participants or spectators.

f. *Attendance of Witnesses; Testimony by Respondent.* Members of the University community subject to these Rules are compelled under penalty of disciplinary action under these Rules, to appear as witnesses if summoned by the Hearing Officer. Failure to appear shall constitute a simple violation, provided there is proof of notice. The respondent is compelled to attend the hearing under penalty of suspension. He may be a witness only if he freely consents to be; failure to testify may not be weighed against him; however failure to answer any question on the part of a respondent who agrees to testify may be weighed against him.

g. *Contempt Procedures,;Disruptions.* The Hearing Officer may find a person in contempt of the Rules who fails to obey proper order of the Hearing Officer during the hearing. If any person present at a hearing continues seriously to interfere with or substantially disrupt the orderly functioning of the hearing, after being given proper warning by the Hearing Officer, the Hearing Officer may find the person in contempt of the Rules. The Hearing Officer may hear and decide cases of contempt by summary proceedings during the hearing. If the person found in contempt is a respondent, he shall be subject to either disciplinary warning or censure and shall be warned that any further contempt, including further disruption, will lead to his suspension. The penalty for being twice found in contempt shall be suspension, in accordance with Section 411.1(3) of these Rules. If the person found in contempt is not a respondent, he shall be subject to either disciplinary warning or censure and shall be asked to leave the hearing. The Hearing Officer will warn the party that if he does not leave he will be suspended. Failure to leave at this time shall mandate a suspension in accordance with Section 411.1(3) of these Rules. If a disruption occurs, the Hearing Officer may:

1. Order a recess and reconvene.

2. Reconvene at an alternate place.

3. Reconvene and limit the number of spectators.

4. Reconvene and exclude designated spectator participants in the prior disorder.

5. Reconvene in a closed hearing, provided that members of the University news media shall be excluded only on request of the respondent, save when an individual reporter acts obstreperously, in which case the Hearing Officer may admit a replacement for him.

h. *Respondent's Right to Elect Alternate Procedures in the Case of Charges of a Serious Violation.* At any time up to the day of the hearing, student respondents may elect Dean's Discipline in lieu of these Rules; faculty and staff respondents may elect the disciplinary procedures to which they would ordinarily be subject but for these Rules. A respondent who has once elected the alternate procedure shall not thereafter be subject to these Rules with respect to the violations with which he was charged.

i. *Status of Respondent during Proceedings.* Any respondent granted a leave of absence during the pendency of proceedings shall not, on that account, be granted a postponement or deferment. If, however, a respondent, having been notified of charges brought against him, voluntarily withdraws from the University permanently or indefinitely, the charges shall be dropped and proceedings shall be terminated. Upon any subsequent application for readmission to the University by a respondent who has withdrawn under such circumstances, the Dean shall decide whether the applicant shall be subject to further discipline as a requirement for readmission.

Whether degrees or certificates shall be withheld from candidates charged with violations of these Rules pending hearings is a matter of administrative discretion to be exercised by the appropriate Dean. The decision should take into account the seriousness of the charge, the degree of punishment likely to be given, and the extent to which the plans of the respondent will be disrupted.

A student's transcript shall not be withheld during the pendency of hearings, but the transcript shall be issued with a notation thereon of the pendency of the hearing and the possibility of sanctions if the respondent is found guilty of a violation of the Rules. The requirement of the notation may be waived in the discretion of the appropriate Dean.

If the respondent is charged with a violation of these Rules and criminal or civil charges are brought against the respondent for the same occurrence as the result of police action or civil proceedings, the University may proceed with disciplinary action, with the understanding that the respondent's response to the criminal charge shall take precedence should a conflict in hearing times occur.

j. *Conduct of Hearings after the End of an Academic Term.* Except for the appeal procedures set forth in §418, the processes of these Rules shall go forward notwithstanding the end of an academic term. The University shall provide housing free of charge for up to seven days to all student respondents who remain at the University to participate in a hearing on charges against them after their room contracts with the University expire; the Hearing Officer in his discretion may extend the University's obligation to house respondents free of charge. The Hearing Officer in his discretion may excuse any student respondent from attendance at a consolidated hearing on a showing of hardship, provided the respondent agrees to be bound by the Hearing Officer's decision made on the basis of the consolidated hearing conducted during the respondent's absence.

k. *Decision of the Hearing Officer.* The Hearing Officer promptly after the conclusion of the hearing shall prepare and send to the Rules Administrator and the respondent and such respondent's advisor, by hand delivery or registered mail, a written decision with an explanation of the reasons therefor, either acquitting the respondent of the charges or finding the respondent guilty of the charges on the basis of the clear preponderance of the evidence; the Hearing Officer may not find a respondent guilty of a simple violation subsumed under charges of a serious violation. If the Hearing Officer finds the respondent guilty, the Hearing Officer shall in his or her decision impose the sanction of Suspension or Dismissal giving due regard to the circumstances of the offense and the offender, the seriousness of the offense, and offender's prior disciplinary record, except that the sanction of Suspension shall be imposed if the Hearing Officer finds the respondent guilty of charges of a simple violation based on conduct occurring while the respondent was under Censure.

§418. APPEAL PROCEDURES.

a. In cases of charges of a simple violation, the appeal procedure shall be as provided in the relevant Deans Discipline. Only the respondent may appeal in the case of charges of a simple violation.

b. In the case of charges of a serious violation, the appeal procedure shall be as follows:

(1) *Right to Appeal; Notice of Appeal.* Either the Rules Administrator or the respondent may appeal the decision of the Hearing Officer by filing a notice of appeal with the Chairman of the University Judicial Board within 10 days after the sending of the decision by the Hearing Officer. A person found in contempt by the Hearing Officer may appeal the Hearing Officer's decision by filing a notice of appeal with the Chairman of the University Judicial Board within 10 days after the Hearing Officer's decision. A notice of appeal shall be in writing and shall include a brief statement of the reasons therefor. For purpose of this §418, only those days shall be counted that occur during the University's fall or spring term; any action taken between those terms shall be considered as having occurred on the first day of the next following fall or spring term.

(2) *Arrangements for the Appeal Hearing.* Promptly after the filing of a notice of appeal, the Chairman of the University Judicial Board shall:

i. designate a time and place for the appeal hearing, which shall not be less than 10 nor more than 14 days after the filing of the appeal.

ii. notify the other members of the University Judicial Board and the Rules Administrator and the respondent and his advisor, or the person appealing a contempt decision, of the time and place of the appeal hearing.

iii. designate, in consultation with the

Rules Administrator and the respondent and his advisor, or the person appealing a contempt decision, the portions of the hearing record to be considered by the University Judicial Board. The record will normally consist of the record of the prehearing procedures, the verbatim record of the hearing and the Hearing Officer's decision.

(3) *The Appeal Hearing; Scope of the Review of the University Judicial Board.* At the appeal hearing, the Rules Administrator and the respondent and his advisor or the person appealing a contempt decision shall present the case for and against the appeal to the University Judicial Board. In the case of an appeal of a contempt decision, the Rules Administrator shall present the case against the appeal. The case presented shall consist of reasoned argument based on the hearing record; the University Judicial Board shall not hear the testimony of witnesses and shall not consider any evidence not considered by the Hearing Officer. In its review the Board shall consider if requested

i. whether the Hearing Officer erred in the interpretation of these Rules;

ii. abuse of discretion by the Hearing Officer;

iii. the reasonableness of the Hearing Officer's decision on factual matters in light of evidence presented;

iv. the reasonableness of the sanction imposed.

(4) *Decision of the Board.* Within fourteen days after the conclusion of the appeal hearing, the Chairman of the University Judicial Board shall prepare and send to the Hearing Officer, the Rules Administrator, and the respondent and his advisor, or the person appealing a contempt decision, by hand delivery or registered mail, the Board's written decision, with an explanation of the reasons therefor. The Board's decision may affirm or reverse the Hearing Officer's decision in whole or in part, including reversing an acquittal and imposing sanctions, and may remand to the Hearing Officer or the Rules Administrator for such further proceedings as the Board may direct, but the Board may not increase the sanctions imposed by the Hearing Officer. The Board's decision shall be by majority vote, including the Chairman.

§419. PRESIDENTIAL ACTION.

A final appeal may be made to the President for clemency or review which the President may hear in his or her discretion in the case of charges of a serious violation, and in the case of charges of simple violation only if provided by the relevant Dean's Discipline.

§420. ADDITIONAL JUDICIAL BOARDS.

Should further University Judicial Boards be needed, the Executive Committee of the University Senate may appoint additional University Judicial Boards and shall seek to divide the original University Judicial Board as equitably as possible to ensure maximum continuity of experience.

§421. COMMITTEE ON RULES OF UNIVERSITY CONDUCT.

a. The University Senate Committee on Rules of University Conduct shall prepare any material that will facilitate the functioning of the procedures.

b. Persons otherwise connected with the disciplinary procedures shall be excluded from the University Senate Committee on Rules of University Conduct.

c. All changes in these Rules shall be passed by the University Senate for approval and acceptance by the Trustees in accordance with the Statutes of the University.

Draft of June 29, 1990

COLUMBIA UNIVERSITY
Model "Dean's Discipline" Procedures

A student charged with a disciplinary infraction subject to "Dean's Discipline" is entitled to notice of the charges, an opportunity to be heard and an opportunity to appeal a disciplinary decision to the Dean of this School.*

Ordinarily, a disciplinary proceeding begins with a written communication from the Office of the Dean of Students [or equivalent dean] requiring the student to attend a disciplinary hearing to respond to a specified charge. (In rare cases, the proceeding may begin with an oral communication requiring the presence of the student at a hearing.) The hearing is held before at least two deans or staff. The hearing is a fact-finding, not an adversarial courtroom-type, proceeding; the student may not necessarily be present to hear other witnesses and there is no formal cross-examination of witnesses or objecting to evidence. In addition, although students are always free to consult with an attorney, they may not have an attorney present during a disciplinary hearing or at any appeal.

The student is informed of the evidence that led to the charges against him or her and asked to respond. The student may offer his or her own evidence. This includes the student's own appearance at the hearing and may include the appearance of others (witnesses) on his or her behalf and any written submission or relevant documents the student may wish to submit.

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* The University-Wide Rules of University Conduct govern conduct incident to demonstrations, rallies and picketing and may displace "Dean's Discipline" in cases of serious violations.

After the Office of the Dean of Students [or equivalent office] has heard the student and others and considered all of the evidence, it reaches a determination and notifies the student in writing of that decision. If the student is found to have committed a disciplinary infraction, the penalty can include censure, probation, suspension and dismissal.

The student has the right to appeal a decision that results from a disciplinary hearing to the Dean of this School. The appeal must be made in writing within [seven] days of the time he or she is notified of the decision, and it must clearly state the grounds for appeal. Such appeal should be sent to the Dean at [campus address].

Normally, on such an appeal, the Dean of the School relies solely upon the written record and does not conduct a new factual investigation. Moreover, the Dean focuses upon whether, in the Dean's view, the decision made and the discipline imposed are reasonable under all of the circumstances of the case. There is no further appeal within the University.

Draft of June 29, 1990

COLUMBIA UNIVERSITY

Outline of Minimum Procedural Criteria
"Dean's Discipline"

I. Notice of the Charges

  A. Ordinarily in writing
  B. Specifies nature of charges
  C. Requires student to attend a disciplinary hearing

II. Opportunity to be Heard (Hearing)

  A. Student informed of evidence
  B. Student asked to respond
  C. Student right to offer own evidence including:

    1. other relevant witnesses
    2. relevant documents
    3. written submission

  D. Fact-finding rather than adversarial courtroom-type proceeding:

    1. Attorneys may not be present (although students are free to consult attorneys)
    2. No formal cross-examination of witnesses or objecting to evidence

III. Written Determination after Hearing

IV. Right to Appeal to the Dean

  A. Appeal must be made within [7] days of student's notification of determination
  B. Appeal must be in writing and clearly state grounds for appeal
  C. Normally, Dean considers only written record; no new factual investigation
  D. Standard of appeal: Whether decision made and discipline imposed are reasonable under all of the circumstances
  E. No further appeal within the University

THE GEORGE WASHINGTON UNIVERSITY GUIDE TO STUDENT RIGHTS AND RESPONSIBILITIES

1992–1993

Contents: STATEMENT OF STUDENT RIGHTS AND RESPONSIBILITIES
UNIVERSITY POLICY ON EQUAL OPPORTUNITY
POLICY ON SEXUAL HARASSMENT
STUDENT GRIEVANCE PROCEDURES
CODE OF STUDENT CONDUCT
UNIVERSITY POLICY ON ACADEMIC DISHONESTY
PRIVACY OF STUDENT RECORDS
A FINAL WORD ABOUT SECURITY

STATEMENT OF STUDENT RIGHTS AND RESPONSIBILITIES

PREAMBLE

Academic institutions exist for the transmission of knowledge, the pursuit of truth, the development of students, and the general well-being of society. Free inquiry and free expression are indispensable to the attainment of these goals. As members of the academic community, students should be encouraged to develop the capacity for critical judgment and to engage in a sustained and independent search for truth.

Freedom to teach and freedom to learn are inseparable facets of academic freedom. The freedom to learn depends upon appropriate opportunities and conditions in the classroom, on campus, and in the larger community. Students should exercise their freedom with responsibility.

The responsibility to secure and to respect general conditions conducive to the freedom to learn is shared by all members of the academic community. The University has a duty to develop policies and procedures that provide and safeguard this freedom.

The George Washington University believes that the procedures, rights, and safeguards outlined below are indispensable to achieving the goals desired—freedom to teach, to learn, and to search for truth.

I. BASIC ASSUMPTIONS

A. Freedom of Expression

Student organizations and individual students shall be free to examine and to discuss all questions of interest to them and to express opinions publicly and privately. They shall be free to support causes by orderly means that do not disrupt the regular and essential operation of the institution. At the same time, it shall be made clear to the academic and the larger community that in their public expressions or demonstrations the students or student organizations speak only for themselves.

The students have the rights and responsibilities of a free academic community. They shall respect not only their fellow students' rights but also the rights of other members of the academic community to free expression of views based on their own pursuit of the truth and their right to function as citizens independent of the University.

B. Freedom from Discrimination

The University will not permit discrimination on grounds of sex, race, color, religion, national origin, handicap, or sexual orientation in any University-recognized area of student life. Additionally, all areas of student life are subject to the provisions of the District of Columbia Human Rights Law. However, those campus organizations that are essentially and avowedly social fraternal groups may limit membership on the basis of sex; those campus organizations that are essentially and avowedly sectarian may limit membership on the basis of religion.

C. Student Rights in the Governing of the University

The University is a community of scholars engaged in the search for knowledge. Students, faculty, and administrators participate in this search. In light of this, the student body shall have clearly defined means, including membership on appropriate committees and administrative bodies, to participate in the formulation and application of the institutional policy affecting student affairs. The concern of students, however, legitimately extends beyond what has normally been considered student affairs. Their interest in academic policies, for example, is a development to be encouraged bearing in mind the teaching-learning context of the University community.

D. Professional Rights of the Faculty

In order to safeguard the professional rights of the faculty, no provision for the rights of students can be considered valid if it suspends professional rights or in any measure invades them.

II. STUDENTS IN THE CLASSROOM

The professor in the classroom and in conference should encourage free discussion, inquiry, and expression. Student performance should be evaluated solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards.

A. Protection of Freedom of Expression

Students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.

B. Protection Against Improper Academic Evaluation

Students should have protection through orderly procedures against prejudiced or capricious academic evaluation. At the same time, they are responsible for maintaining standards of academic performance established for each course in which they are enrolled.

Except in instances that involve a student grievance based on allegation of illegal discrimination for which other remedy is provided under "Student Grievance Procedures," a student who alleges an instance of prejudiced or capricious academic evaluation shall be heard and the allegation reviewed through faculty peer review procedures established by the dean and faculty of the school in which the contested academic evaluation took place. Should the peer review processes find in favor of and uphold the complaint of the student, yet the faculty member were to persist in refusing to alter the academic evaluation at issue, the Dean's Council and the dean shall afford the student an appropriate remedy after consultation with the peer review body.

C. Protection Against Disclosure

Information about student views, beliefs, and political associations, which professors acquire in the course of their work as instructors, advisers, and counselors, should be considered confidential. Protection against disclosure is a serious professional obligation. Judgments of ability and character may be provided under appropriate circumstances, normally with the knowledge or consent of the student.

III. STUDENT PARTICIPATION IN ACADEMIC POLICY-MAKING

In light of the basic assumption of student involvement in academic affairs, each department or academic unit administering a degree program should encourage formation of an organization of its majors to reflect student views on matters of academic policy; and each department or other academic unit administering a degree program shall establish an advisory council representing faculty, students, and others as deemed advisable so as to provide a meaningful exchange of views on departmental policies among the parties so represented, provided, however, that the application to specific individuals of department policies on salary, promotions, and tenure is a matter of faculty responsibility.

In addition, clearly defined means for student participation in academic policy-making at the college or school level of the respective schools and college, where college- or school-wide advisory councils have not been established in accordance with the provisions above, shall be developed by faculty-student committees.

IV. THE STUDENT AS A CAMPUS CITIZEN

A. Student Government

The University recognizes the right of the students to form and democratically elect their governing bodies as a means to participate in discussion of issues and problems facing the academic community. The governing bodies shall function as representatives of the student to the administration and faculty of the University, as well as to the entire community.

The electorate of a University-wide student government shall consist of the entire student body. Any elected members of a governing body representing less than the entire student body shall be elected in such manner as to create or preserve essential representational equality.

B. Student Organizations

1. Freedom of Student Association: The students of The George Washington University are free to organize and join organizations to promote their common and lawful interests, subject to University regulations. The fact of affiliation with any extramural association or national organization or political party, so long as it is an openly declared affiliation, should not of itself bar a group from registration or recognition. However, action may be taken to ensure that the University does not, through the activities of campus organizations, stand in violation of laws that place limits on campus political activities. The administration and faculty shall not discriminate against a student because of membership in any student organization meeting the conditions of this section.

2. Registration, Recognition, and Disclosures: All student organizations shall be registered and recognized in accordance with the University regulations. Registration or recognition may be withheld or withdrawn from organizations that violate University regulations. Registration and recognition procedures shall require identification of responsible officers and all non-University members, but shall not otherwise require membership lists except as such lists may be required to insure that organizations observe the provision of Section I, paragraph B.

3. Use of Campus Facilities: Meeting rooms and other campus facilities should be made available, on an equitable basis, to all registered student organizations, as far as the primary use of these facilities for other University purposes permits and in keeping with the best interests of the University.

C. Student-Sponsored Forums

Students shall have the right to assemble, to select speakers, and to discuss issues of their choice, provided that the assembly is lawful in nature, does not interfere with the processes of the University, and does not infringe upon the rights of others; the University reserves the right to prohibit assemblies having in its judgment the clear likelihood of failing to meet one or more of these conditions.

Students shall be allowed to invite and hear any person of their own choosing, subject to the conditions listed here. Those routine procedures required by the University before a guest speaker is invited to appear on campus shall be designed only to ensure that there is orderly scheduling of facilities and adequate preparation for the event and that the occasion is conducted in a manner appropriate to an academic community. The control of campus facilities shall not be used as a device to restrict a guest speaker's expression solely on the basis of disapproval or apprehension of his ideas or motives. However, it shall be made clear to the academic and larger community by sponsoring organizations that sponsorship of guest speakers does not necessarily imply University approval or endorsement of views expressed.

Students must recognize their responsibility to uphold the right of free speech and to permit invited speakers to appear and speak without inappropriate interruption or demonstration. The members of the University community are urged to hear all sides of controversial issues represented.

D. Pamphlets, Petitions, and Demonstrations

The George Washington University is committed to the protection of free speech, the freedom of assembly, and the safeguarding of the right of lawful protest on campus.

Therefore, student organizations and individual students shall have the right to distribute pamphlets, collect names for petitions, and conduct orderly demonstrations provided these actions are not disruptive of normal University functions and do not encompass the physical takeover or occupation of buildings, offices, classrooms, hallways, or other parts of buildings without authorization of the University, whether or not University functions are performed in them at that time.

While all students have the right to dissent and to protest, the limitation exists that these rights shall not be exercised in such a manner as to infringe on the rights of other students, or of faculty members, to conduct class, hold their own meetings or hear another speaker, or in such a manner as to be disruptive of normal University functions. No one group or organization holds a monopoly on dissent or on freedom to hear all sides. Further, the fact that students may pursue their interests through speech and assembly on campus does not abrogate their accountability as citizens to the laws of the larger society, and the University is entitled to reflect these constraints in its own regulations.

E. Student Publications and Media

The student press and media shall be free of censorship and advance approval of copy, while being governed by the canons of responsible journalism.

Editors and managers of student publications or broadcast stations shall be free from arbitrary suspension and removal because of student, faculty, administrative, or public disapproval of editorial policy or content. Only for proper and stated causes shall editors and managers be subject to removal and then by orderly and prescribed procedures. Such removal shall be deemed a form of disciplinary action and therefore subject to prescribed due process in disciplinary cases. The agency responsible for the appointment of editors and managers shall be the agency responsible for their removal.

Even though certain publications may be financially dependent on the University, in the delegation of editorial responsibility to students, the University shall provide sufficient editorial freedom and financial autonomy for the student publications to maintain their integrity of purpose as vehicles for free inquiry and free expression in an academic community.

All student publications that are published and financed by the University shall explicitly state on the editorial page that the opinions expressed are those of the publication and are not necessarily those of the University or the student body.

Any committees for the supervision of such publications or media shall have student members.

V. REGULATIONS CONCERNING STUDENT LIFE ON CAMPUS

A. The Enactment of Regulations

University-wide regulations intended to formalize general standards of student conduct may be recommended to the Board of Trustees by appropriate committees composed entirely of students or jointly of students, faculty, and administrative representatives. University-wide regulations do not contemplate specialized regulations or rules governing academic, business, or contractual matters, nor rules or regulations published by administrators, students, or faculty for the control of facilities or programs, such as those not normally submitted to the Board of Trustees for approval. Generally understood standards of conduct, such as respect for the persons or property of others, continue to apply and may form the basis of disciplinary action though nowhere specified in particular detail.

It is the intent of this section to bring students into active participation in the formulation of University-wide regulations not excepted above, and to encourage the inclusion of students as active participants in the formulation of those regulations excepted above to the extent that such involvement can be accomplished reasonably and practicably.

B. Standards of Fairness and Student Rights in Disciplinary Cases

The George Washington University respects and is determined to protect the individual dignity, integrity, and reputations of its students. At the same time it requires that students comply with those conventions and regulations of University life that are necessary to maintain order, to protect individuals and property, and to fulfill its purposes and responsibilities as a University. To this end, the University realizes that the prevailing rule in matters of student discipline must continue to be that of common sense, and an excessive legalism can only disserve the University and its community of students, faculty, and staff. The model for disciplinary procedures that the University adopts is that of the administrative process, not that of the criminal or civil courts.

Certain procedural rights shall be guaranteed to a student in any University disciplinary proceeding in which he or she stands to bear significant injury, such as expulsion, suspension, permanent reprimand, or other stigmatizing action. A student subject to such disciplinary action is in danger of injury to his or her reputation, opportunity to learn, and earning power. He or she should therefore enjoy full protection of his or her rights:

1. The right to notice of charges whenever formal action upon such charges is initiated, such notice to be given within a reasonably prompt period and with sufficient particularity as to the facts that the student may reasonably investigate the charge and prepare his or her defense, with reasonable and appropriate recesses and continuances being provided to all parties.

2. The right to confront and cross-examine any witnesses appearing against him or her, to produce witnesses on his or her own behalf, to present evidence, to know prior to the hearing the contents of and the names of the authors of any written statements that may be introduced against him or her, and to rebut unfavorable inferences that might be drawn from such statements. The right not to be compelled to be a witness against himself or herself or to have his or her silence taken as an indication of guilt.

3. The right to a decision based upon evidence of a kind upon which responsible persons are accustomed to rely in serious affairs. However, rules of evidence in courts of law shall not, as such, be applied. The reliance upon evidence shall be determined by fundamental principles of fair play.

4. The right not to be sanctioned unless the decision maker is persuaded by a preponderance of the evidence that the student is guilty.

5. The right to be accompanied in all proceedings by an adviser (student, faculty, or other) of his or her own choosing and at his or her own expense, or if such adviser is unavailable, a student or faculty member provided by the hearing body.

6. The right to have the option of a public hearing in the discretion of the presiding officer, upon the student respondent's request.

7. The right to appeal decisions to a higher authority or hearing body within the administrative processes provided.

8. The right to have his or her case processed without prejudicial delay.

Hearings shall be tape-recorded or transcribed.

Following an alleged act of student misconduct, and until final disposition of the charges, the status of a student shall not be altered or his or her right to be present on campus and to attend classes suspended, except for reasons relating to his or her physical or emotional safety and well-being or for reasons relating to the safety and well-being of other students, faculty, or University property, or for reasons relating to the protection of the normal functions of the University.

Changes in the status of a student that are not disciplinary in character intended neither as punishment nor as censure, but required by administrative, academic, or security interests of the University and its community are not governed by these disciplinary procedures.

The University disciplinary hearing system should not become excessively legalistic or adversarial. The hearing bodies may find it necessary frequently and firmly to remind parties, counsel, or advisers that the proceedings are not criminal or civil trials, that criminal or civil standards of due process and rules of evidence are not controlling, and that the hearing bodies shall enjoy considerable discretion to interpret, vary, and waive procedural requirements to the end that a just and fair decision may be obtained.

VI. STUDENTS AS OFF-CAMPUS CITIZENS

In their off-campus lives, in matters not related to University functions, students shall not be considered under the control of the University, nor shall the University or its student governments be held responsible for the off-campus activities or personal conduct of its individual students.

A. Off-Campus Political Activities of Students

No disciplinary action shall be taken by the University against a student for engaging in such off-campus activities as political campaigning, picketing, or participating in public demonstrations, subject to the provisions of paragraph B.

B. Other Off-Campus Activities of Students

Students who violate a local ordinance or any law risk the legal penalties prescribed by civil authorities. An educational institution need not concern itself with every violation. Nevertheless, the University may take disciplinary action against those students whose behavior off University premises indicates that they pose a serious and substantial danger to others.

C. Student Records

Policies concerning the retention, release, and confidentiality of student records shall be recommended by the registrar, the schools, departments, and other record-keeping agencies, with appropriate student representation in the formulating of these policies, and shall be published upon adoption by the Board of Trustees.

VII. AMENDMENT, INTERIM AND EMERGENCY POWERS, AND IMPLEMENTATION

A. Amendment, Interim and Emergency Powers

In conformity with the University Charter, the By-Laws of the Board of Trustees, this statement may be amended by the Board of Trustees; the faculty retains interim power to discipline students prior to action of the Board of Trustees under regulations adopted by the Board of Trustees.

Nothing in this statement can infringe or intends to infringe upon the authority of the Trustees to amend the statement. Further, this statement shall not prevent the Administration of the University from taking such action as it deems necessary to the functioning or welfare of the University in any matter prior to action of the Board of Trustees.

B. Implementation

After adoption by the Board of Trustees, the provisions of this statement shall be put into effect in a manner that provides for both speedy implementation and orderly transition.

Adopted by the Executive Committee of the Board of Trustees, August 7, 1970.

UNIVERSITY POLICY ON EQUAL OPPORTUNITY

The George Washington University does not unlawfully discriminate against any person on the basis of race, color, religion, sex, national origin, age, handicap, veteran status, or sexual orientation. This policy covers all programs, services, policies, and procedures of the University, including admission to education programs and employment. The University is subject to the District of Columbia Human Rights Law.

Inquiries concerning the application of this policy and federal laws and regulations concerning discrimination in education or employment programs and activities may be addressed to Susan B. Kaplan, Assistant Vice President for Legal Matters, The George Washington University, Washington, D.C. 20052, (202) 994-6503, or to the Assistant Secretary for Civil Rights of the U.S. Department of Education.

Disabled individuals who need special information should call the Office of Disabled Student Services, (202) 994-8250 (TDD/voice).

June 1992

POLICY ON SEXUAL HARASSMENT

The George Washington University reaffirms its commitment to maintaining a positive climate for study and work in which individuals are judged solely by relevant factors such as ability and performance and are free to pursue their academic and work activities in an atmosphere that is free from coercion and intimidation. Sexual harassment of students by faculty or administrators or of employees by those in a position to affect their employment status or by other employees in the work unit is inimical to such an atmosphere and will not be condoned.

The University has adopted a definition of sexual harassment that will be applied in determining whether or not particular conduct constitutes sexual harassment. This definition parallels Section 1604.11 of the Equal Employment Opportunity Commission Guidelines on Discrimination because of Sex. Sexual harassment shall be defined as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is made explicitly or implicitly a term or condition of academic advancement or employment, (2) submission to or rejection of such conduct by an individual is used as a basis for decisions relating to the academic advancement or employment of the individual, (3) such conduct has the purpose or effect of substantially interfering with an individual's academic or work performance or limiting participation in University programs, or (4) the intent or effect of such conduct is to create an intimidating, hostile, or offensive academic or work environment.

In accordance with the statement on academic freedom as outlined in the Faculty Code and ordinances, course contents or emphasis and textbooks and other assigned materials are specifically exempted from coverage.

Violation of this policy may lead to disciplinary action, to include suspension or termination.

Ms. Annie Wooldridge, Assistant Vice-President for Administrative and Information Services, is available to faculty to discuss complaints of sexual harassment. Ms. Linda Donnels, Dean of Students, or her designee is available to students to discuss complaints of sexual harassment. Ms. Ethel C.S. Bothuel, Director of Equal Employment Activities, and her staff will discuss complaints with administrative staff and employees.

Students who wish to discuss sexual harassment complaints informally and confidentially may contact any member of the Committee on Student Sexual Harassment. The names and phone numbers of committee members may be obtained from the Office of the Dean of Students.

STUDENT GRIEVANCE PROCEDURES

I. GENERAL

These grievance procedures are promulgated to provide a channel for resolution of the grievances of students who feel they have been discriminated against on the basis of sex, race, color, religion, age, national origin, handicap, or sexual orientation in any of the policies, procedures, programs, or activities of or by any individual employed by or acting in an official capacity for The George Washington University.

The procedures are intended to encourage resolution of the student's grievance informally and at the earliest possible stage. At the same time, where such resolution is not possible, these procedures provide for a more formal review of the situation by individuals not party to the case and a final decision based upon that review by the appropriate dean or vice president. In providing these procedures, it is the intention of the University to carry them out in an equitable and timely manner. However, in extenuating circumstances, it may not be possible to adhere to established time frames, and extension of time shall not be construed as failure to follow established procedures.

It shall be a violation within the meaning of these regulations to discriminate against any student because he or she has opposed any discriminatory practice proscribed by these procedures, or because he or she has filed a grievance, testified, assisted, or participated in any manner in the procedures provided for herein.

A. Eligibility

Any full time or part-time student who believes that he or she has been discriminated against on any of the bases cited above may initiate these procedures. Employees, both full-time and part-time, who are also students may use these procedures for matters relating to their student status only. (For grievance procedures to resolve charges of discrimination in employment, employees should consult the Faculty Code or the Manual of Personnel Policies, as appropriate.) These grievance procedures are not available to applicants to any of the University's academic units, including applicants who are or have been registered students in another of the University's academic units.

B. Coverage

A student may charge discrimination on the basis of sex, race, color, religion, age, national origin, handicap, or sexual orientation in the policies, procedures, programs, or activities of or by any individual employed by and acting in an official capacity for The George Washington University. However, in accordance with the statement on academic freedom as outlined in the Faculty Code and Ordinances, course content or emphasis and/or textbooks and other assigned materials are specifically exempt from coverage.

Individuals and/or registered student organizations who feel they have been discriminated against by chartered student organizations as they act to carry out responsibilities specifically delegated to them by the Board of Trustees or the President may charge the organization under these procedures. Individuals who feel they have been discriminated against by having been denied the rights and privileges of membership or participation in registered student organizations may also charge the registered student organization under these procedures. University policy permits campus organizations that are social fraternal groups to limit membership on the basis of sex and sectarian groups to limit membership on the basis of religion.

A faculty member or administrator having administrative responsibility relating to the group being charged shall be appointed by the Assistant Dean of Students, Dean of Students Office, to carry out the function assigned to the department chair outlined in II.C. Grievance Review Committees for student organizational matters shall consist of two faculty members, one administrator, and two students.

II. GRIEVANCE PROCEDURES

A. Students who believe they have been injured in some fashion by discrimination must first seek to clarify or resolve the question through direct contact with the individuals whose action gave rise to the matter.

B. If the student is unable to clarify or resolve the matter, the student must confer with and submit a signed written statement of the charge to the Assistant Dean of Students. The written statement must include the following: the name of the faculty member, administrator, or student organization whose action gave rise to the matter; the type of discrimination alleged; a statement of the injury alleged and the resolution sought; and a summary, to include time, place, and results, of the discussion that took place as required in II.A. above.

C. The Assistant Dean of Students shall refer the charge to the appropriate academic or administrative department chair. The department chair shall seek to mediate the charge and thereby effect an informal resolution of the matter; failing informal resolution, after consultation with both parties, the department chair shall make a decision concerning the charge that shall be conveyed in writing to both parties by registered or certified mail and to the Assistant Dean of Students. This mediation phase of the procedures should be completed within 15 class days.

If the individual whose action gave rise to the matter is an academic department chair, dean, or administrator, or a faculty member reporting directly to a dean or vice president, the Assistant Dean of Students shall refer the matter directly to a dean or vice president, or if the academic or administrative department chair wishes to disqualify himself or herself because of prior knowledge of the matter, the Assistant Dean of Students shall refer the matter directly to the appropriate dean or vice president, who shall designate another academic department chair, dean, administrator, or faculty member under his or her supervision to perform the function required by this subsection. The person selected by the dean or vice president must be at least equal in position and rank to the person against whom the grievance has been filed.

If, because of prior knowledge of the matter, the dean or vice president wishes to disqualify himself or herself from performing any of the functions outlined in these grievance procedures, the matter will be referred to the President who shall designate another dean or vice president to perform one or more of the functions outlined in these procedures.

D. Either party to the case may request a review of the decision rendered under Subsection C. by writing the Assistant Dean of Students within five class days of receipt of the department chair's decision.

E. The Assistant Dean of Students shall send a copy of the request for review to the appropriate dean or vice president, and shall, within ten class days, appoint a Grievance Review Committee, which shall advise the dean or vice president.

1. The Grievance Review Committee for academic matters will consist of two faculty members and two students.

2. The Grievance Review Committee for administrative matters will consist of one faculty member, one administrator, and one student.

3. Committee members will be selected from among a panel of ten faculty members selected by the Faculty Senate, ten students selected by The George Washington University Student Association, and five administrators selected by the Vice President for Information and Administrative Services. At least five students named to the panel shall be enrolled in programs at the graduate level. Appointments to the panel shall be made for one year from July 1 to June 30. Appointments are renewable. The Assistant Dean of Students will select the committee members for each review and will appoint one of the members to serve as chair. In the event panel members are not available to serve, the Assistant Dean of Students shall have the authority to appoint committee members from the appropriate constituency from outside the panels to hear a particular grievance. Upon the request of the chair, the Assistant Dean of Students shall serve as advisor to the Review Committee.

4. Within thirty class days of appointment, the Grievance Review Committee shall hear the grievance together with such witnesses as it deems germane to the grievance or as may be called by either party. Each party shall be entitled to question all witnesses appearing at the hearing and to present written statements or other evidence. Either party may be accompanied at the hearing by one person whom he or she has selected.

The proceedings shall in all respects be under the control of the chair and shall not be subject to formal rules of evidence or procedure. At the discretion of the Committee, the proceedings may be closed or may be open to members of the University community. The proceedings shall be recorded and the recording preserved for three years along with any written statements of evidence presented. A copy of the recording will be made available to the grievant upon request. Costs incurred in producing the copy shall be the responsibility of the grievant.

The Grievance Review Committee shall convey its advice on the solution of the grievance to the appropriate dean or vice president and to the Assistant Dean of Students within five class days of the conclusion of the hearing. The Assistant Dean of Students shall distribute copies of the Committee's findings to both parties.

5. The dean or vice president shall make a decision within five class days after receiving the advice of the Grievance Review Committee. The decision of the dean or vice president shall be in writing and shall be conveyed to both parties by registered or certified mail; the decision made by the dean or vice president shall be final. However, to the extent that the decision involves the changing of an academic evaluation, the decision cannot be implemented without the consent of the cognizant faculty member(s) unless approved by the Dean's Council.

F. The Faculty Senate, the Joint Committee of Faculty and Students, and the Student Senate shall be consulted before any revisions are made to these procedures.

February 1988

CODE OF STUDENT CONDUCT

Authority for Student Discipline

1. Ultimate authority for student discipline is vested in the Board of Trustees by the University Charter. Disciplinary authority may be delegated to University administrators, faculty members, committees, and organizations, as set forth in this *Code*, or in other appropriate policies, rules, or regulations adopted by the Board. Students are asked to assume positions of responsibility in the University judicial system in order that they might contribute their skills and insights to the resolution of disciplinary cases.

Rationale

2. The primary purpose for the imposition of discipline in the University setting is to protect the campus community. Consistent with that purpose, reasonable efforts will also be made to foster the personal, educational, and social development of those students who are held accountable for violations of University regulations.

Commentary

The University must commit its policies and procedures first of all to protect and promote the academic enterprise. Consequently, it may be necessary to suspend or expel students who have been found responsible for violations of this *Code*, or who otherwise pose a substantial danger to the campus community.

Any punishment imposed in accordance with this *Code* may also have the value of discouraging the offender and others from engaging in future misbehavior. In cases of minor disciplinary violations, the particular form of punishment may be designed to draw upon the educational resources of the University in order to bring about a lasting and reasoned change in behavior. However, the underlying rationale for punishment need not rest on deterrence or "reform" alone. A just punishment may also be imposed because it is deserved and because punishment for willful offenses affirms the autonomy and integrity of the offender.

Definitions

3. When used in this *Code*:

a) The term "aggravated violation" means a violation that resulted or foreseeably could have resulted in significant damage to persons or property or that otherwise posed a substantial threat to the stability and continuance of normal University or University-sponsored activities.

b) The term "distribution" means any form of sale, exchange, or transfer.

c) The term "group" means a number of persons who are associated with each other but who have not complied with University requirements for registration as an organization.

d) The terms "institution" and "University" mean The George Washington University and all of its undergraduate, graduate, and professional schools, divisions, and programs.

e) The term "organization" means a number of persons who have complied with University requirements for registration.

f) The term "reckless" means conduct that one should reasonably be expected to know would create a substantial risk of harm to persons or property or that would otherwise be likely to result in interference with normal University or University-sponsored activities.

g) The term "student" means any currently enrolled person for whom the institution maintains educational records, as defined by the Family Educational Rights and Privacy Act of 1974 and related regulations.

h) The term "University premises" means buildings or grounds owned or leased by the University. "University premises" does not include any such buildings or grounds which are leased or sublet to any persons or business entities, with the exception of the following:

1. Buildings or grounds which comprise the University residence hall system; and
2. University food service facilities; and
3. Marvin Center facilities; and
4. Buildings or grounds which are operated in the name of any officially-registered student organization.

i) The term "weapon" means any object or substance designed to inflict a wound, cause injury, or incapacitate, including, but not limited to, all firearms, explosives, pellet guns, slingshots, martial arts devices, brass knuckles, switchblades, bowie knives, daggers or similar knives, and chemicals such as Mace or tear gas. A harmless instrument designed to look like a firearm, explosive, or weapon, which is used by a person to cause reasonable apprehension of harm or to assault another person, is expressly included within the meaning of weapon.

j) The term "University-sponsored activity" means events and activities initiated by a student, student group or organization, or University department, faculty member or employee which:

1. Are expressly authorized, aided, conducted or supervised by the University; or
2. Are funded in whole or in part by the University; or
3. Are initiated by an officially-registered student organization and conducted or promoted in the name of that student organization and/or the University; or
4. Take place on University premises.

k) The terms "will" or "shall" are used in the imperative sense.

Interpretation of Regulations

4. The purpose of publishing disciplinary regulations is to give students notice of prohibited behavior. This *Code* is not written with the specificity of a criminal statute.

Inherent Authority

5. The University reserves the right to take necessary and appropriate action to protect the safety and well-being of the campus community. Such action may include taking disciplinary action against those students whose behavior off University premises indicates that they pose a serious and substantial danger to others.

Commentary

The University will not routinely invoke the disciplinary process for student misbehavior occurring off University premises. Nonetheless, it will be necessary to endeavor to protect the campus community when there are reasonable grounds to believe that a student may pose a substantial danger to others. Normally, such "substantial danger" will be manifested by a pending criminal charge, usually relating to a crime of violence, burglary, substantial theft or fraud, the sale of illegal drugs, or the possession of substantial quantities of illegal drugs.

6. Students may be accountable to both civil authorities and to the University for acts that constitute violations of law and of this *Code*. Disciplinary action at the University will not be subject to challenge on the ground that criminal charges involving the same incident have been dismissed or reduced.

Interim Suspension

7. The Dean of Students or a designee may evict from University housing or, with the concurrence of the Vice President for Academic Affairs or a designee, suspend a student from the University for an interim period not to exceed 21 days, pending disciplinary proceedings or medical evaluation. The interim eviction/suspension shall become immediately effective without prior notice whenever there is evidence that the continued presence of the student on the campus poses a substantial and immediate threat to himself or herself or to others or to the stability and continuance of normal University functions. Interim suspension shall be considered an excused absence.

8. A student suspended or evicted on an interim basis shall be given an opportunity to appear personally before the Dean of Students or a designee and the Vice President for Academic Affairs or a designee (if interim suspension) within five business days from the effective date of the interim suspension or eviction in order to discuss the following issues only:

a) The reliability of the information concerning the student's conduct, including the matter of his or her identity;

b) Whether the conduct and surrounding circumstances reasonably indicate that the continued presence of the student on University premises poses a substantial and immediate threat to himself or herself or to others or to the stability and continuance of normal University functions.

Standards of Classroom Behavior

9. The primary responsibility for managing the classroom environment rests with the faculty. Students who engage in any prohibited or unlawful acts that result in disruption of a class may be directed by the faculty member to leave the class for the remainder of the class period. Longer suspensions from a class, or dismissal on disciplinary grounds, must be preceded by a disciplinary conference or hearing, as set forth in Parts 29 and 30 of this *Code*, or in accordance with Parts 7 and 8.

Commentary

The term "prohibited . . . acts" would include behavior prohibited by the instructor (e.g., smoking in the classroom, persistently speaking without being called upon, refusing to be seated, disrupting the class by leaving and entering the room without authorization, etc.). It must be emphasized that this provision is not designed to be used as a means to punish classroom dissent. The lawful expression of a disagreement with the instructor is not in itself disruptive behavior.

Office of Judicial Affairs

10. The Office of Judicial Affairs within the Dean of Students Office directs the efforts of students and staff members in matters involving student discipline. The responsibilities of the Office include:

a) Determining the disciplinary charges to be filed pursuant to this *Code*.

b) Interviewing, advising, and assisting parties involved in disciplinary proceedings and arranging for a balanced presentation before the various judicial boards.

c) Training and advising the campus judiciary.

d) Maintaining all student non-academic disciplinary records.

e) Developing procedures for conflict resolution.

f) Resolving cases of student misconduct, as specified in Part 29 of this *Code*.

g) Collecting and disseminating research and analysis concerning student conduct.

h) Submitting a report each semester to the campus community, indicating the number of cases referred to the Office, the number of cases resulting in disciplinary action, and the range of sanctions imposed.

Prohibited Conduct

11. The following misconduct is subject to disciplinary action:

a) Intentionally or recklessly endangering, threatening, or causing physical harm to any person on University premises or at University-sponsored activities, or intentionally or recklessly causing reasonable apprehension of such harm.

b) Unauthorized use, possession, or storage of any weapon or explosive on University premises or at University-sponsored activities, whether or not a federal or state license to possess the same has been issued to the possessor.

c) Intentionally initiating or causing to be initiated any false report, warning, or threat of fire, explosion, or other emergency on University premises or at University sponsored activities.

d) Intentionally or recklessly interfering with normal University or University-sponsored activities, including but not limited to, studying, teaching, research, and University administration or fire, police, or emergency services.

e) Knowingly violating the terms of any disciplinary sanction imposed in accordance with this *Code*.

f) Intentionally furnishing false information to the University.

g) Unauthorized distribution or possession for the purpose of distribution of any controlled substance or illegal drug on University premises or at University-sponsored activities.

h) Forgery, unauthorized alteration, or unauthorized use of any University non-academic document or instrument of identification.

i) Intentionally or recklessly misusing or damaging fire safety equipment.

j) Intentionally and substantially interfering with the freedom of expression of others on University premises or at University-sponsored activities.

k) Theft of property or of services on University premises or at University-sponsored activities; knowing possession of stolen property on University premises or at University-sponsored activities.

l) Illegal possession or use of any controlled substance or possession or use of an illegal drug on University premises or at University-sponsored activities.

m) Intentionally or recklessly destroying or damaging University property or the property of others on University premises or at University-sponsored activities.

n) Failure to comply with the reasonable directions of University officials, including University Police officers, acting in performance of their duties. A direction to produce and show an identification card is included in the scope of this provision.

o) Violations of other published University regulations available in the Office of the Dean of Students. Such regulations include the residence hall lease agreement and accompanying regulations, the Alcoholic Beverage Consumption and Distribution Policy, and those regulations relating to entry and use of University facilities, use of amplifying equipment, campus demonstrations, parking office rules and regulations, and regulations governing student organizations.

p) Unauthorized use or possession of fireworks on University premises.

Sanctions

12. a) *Warning:* Notice, orally or in writing, that continuation or repetition of prohibited conduct may be cause for additional disciplinary action.

b) *Censure:* A written reprimand for violation of specified regulations, including a warning that continuation or repetition of prohibited conduct may be cause for additional disciplinary action.

c) *Disciplinary Probation:* Exclusion from participation in privileged or extracurricular institutional activities for a specified period of time. Additional restrictions or conditions may also be imposed. Violations of the terms of disciplinary probation, or any other violation of this *Code* during the period of probation, will normally result in suspension or expulsion from the University.

d) *Restitution:* Repayment to the University or to an affected party for damages resulting from a violation of this *Code*.

e) *Suspension:* Exclusion from classes and other privileges or activities as set forth in the notice for a definite period of time not to exceed one year.

f) *Expulsion:* Termination of student status and exclusion from University privileges and activities.

g) *Other Sanctions:* Other sanctions may be imposed instead of or in addition to those specified in sections (a) through (f) of this part. For example, students may be subject to eviction from University housing for disciplinary violations that occur in the residence halls. Likewise, students may be subject to restrictions upon or denials of University parking privileges for violations involving the use or registration of motor vehicles on campus. Service or research projects may also be assigned.

13. Violations of Part 11 (a) through (h) of this *Code* may result in expulsion from the University. Violations of Part 11 (i) through (m) of this *Code* may result in suspension from the University. Violations of Part 11 (n) through (p) of this *Code* may result in lesser sanctions as listed in

Part 12. Significant mitigating factors shall be considered, which may include the present demeanor and past disciplinary record of the offender as well as the nature of the offense and the extent of any damage, injury, or harm resulting from it.

14. Repeated or aggravated violations of any part of this *Code* may also result in expulsion or suspension or any other sanction that may be appropriate.

Commentary

Parts 13 and 14 represent an attempt to give needed assistance to those who are assessing sanctions. The direction of the guidance is toward imposition of more severe disciplinary sanctions in serious cases. However, the language concerning "mitigating factors" is broad enough to give considerable leeway to do justice, depending upon the facts in each case. The burden of establishing the facts in mitigation should, of course, be upon the respondent.

15. Attempts to commit acts prohibited by this *Code* may be punished to the same extent as completed violations.

Standards of Due Process

16. Students subject to suspension or expulsion from the University will be entitled to a judicial board hearing, as provided in Part 30 of this *Code*. Students subject to eviction from University housing will be entitled to a judicial board hearing, as provided in Part 30 of this *Code*. Students subject to any other sanction will be entitled to an informal disciplinary conference, as set forth in Part 29 of this *Code*.

17. The purpose of a disciplinary proceeding is to provide a fair evaluation of an accused's responsibility for violating disciplinary regulations. Although formal rules of evidence need not be applied, procedures shall comport with standards of fundamental fairness. Harmless deviations from the prescribed procedures shall not necessarily invalidate a decision or proceeding unless significant prejudice to a student respondent or the University may result.

Discipline in Residence Halls

18. Students will be referred for a hearing before the University Hearing Board when they are accused of acts within the residence halls that would constitute a violation of this *Code* or of the residence hall lease, if the violation in question might result in eviction from University housing or suspension or expulsion from the University. The recommended findings and sanctions, if any, prepared by the University Hearing Board will be forwarded to the Executive Director for Campus Life or a designee and to the Dean of Students or a designee. Determination of student housing status will be made by the Executive Director for Campus Life. All other disciplinary determinations will be made by the Dean of Students or a designee.

19. Students subject to lesser sanctions for acts within the residence halls that would constitute a violation of this *Code* or of the residence hall lease will be referred for a disciplinary conference in the Office of Residential Life or a designee in accordance with Part 29. Determination of sanctions affecting student housing status will be made by the hearing officer conducting the conference. Determination of sanctions affecting student status will be made by the Assistant Dean of Students, based on recommendations contained in the case report forwarded to the Office of Judicial Affairs. Notification of University-wide sanctions will be by separate letter.

20. Removal from housing for failure to pay housing fees, assessments, or charges does not constitute disciplinary action and does not fall under the purview of this *Code*.

Case Referrals

21. Any person may refer students or student groups or organizations suspected of violating this *Code* to the Assistant Dean of Students. Allegations of violations occurring within residence halls should be referred to the Director of Residential Life or a designee. Those referring cases are normally expected to serve as complainant and to present relevant evidence in disciplinary hearings or conferences. The Assistant Dean of Students may appoint a member of the campus community to serve as an adviser to the complainant. The role of the adviser shall be limited to consultation with the complainant.

Commentary

Several measures in the *Code* are designed to achieve balance in disciplinary proceedings, even in those cases in which the complainant is inexperienced with administrative adjudication:

a) A special presiding officer may be appointed in complex or serious cases. See Part 30(o).

b) The role of attorneys and advisers is restricted. See Part 31.

c) The "disciplinary conference" procedure is designed to eliminate adversary proceedings in minor cases. See Part 29 and Commentary.

Hearing Referrals

22. The Assistant Dean of Students and the Director of Residential Life, in accordance with Part 21, will review appropriate case referrals to determine whether the alleged misconduct might result in expulsion or suspension from the University or eviction from housing. Students subject to those sanctions will be entitled to a hearing before the University Hearing Board. All other cases will be resolved after an informal disciplinary conference, as set forth in Part 29 of this *Code*.

23. Students referred for a hearing before the University Hearing Board may elect instead to have their cases resolved in accordance with Part 29 of this *Code*. The full range of sanctions may be imposed, including suspension or expulsion from the University, although the right of appeal as set forth in Parts 36–42 shall not be applicable.

24. The Assistant Dean of Students or a designee may defer disciplinary proceedings for alleged minor violations of this *Code* for a period not to exceed ninety days. Pending charges may be withdrawn thereafter, dependent upon the conduct of the respondent.

Judicial Boards

25. Hearings or other proceedings as provided in this *Code* may be held before the following boards or committees:

a) *The Student Traffic Board* considers offenses for which a ticket was issued by the Parking Office as well as adjudications of other parking matters referred by the University Parking Committee. It may both impose and reduce prescribed fines or suspensions of parking privileges. The Board is composed of five students, all of whom must be registered for parking during their term of office. Traffic Board decisions are subject to administrative review at the discretion of the Assistant Dean of Students, but are otherwise considered final and conclusive.

b) *The University Hearing Board* hears all cases resolved in accordance with Part 30 of this *Code*. The Board is composed of five members, to be selected from a pool of eight full-time students, at least five of whom must reside in University housing, and two full-time members of the faculty. The Board shall include at least one faculty member if the alleged misconduct might result in suspension or expulsion from the University.

c) *Ad Hoc Boards* may be appointed by the Assistant Dean of Students, whenever any board is not constituted, is unable to obtain a quorum, or is otherwise unable to hear a case. Ad hoc boards may be composed of administrators, faculty members, students, or any combination thereof. Reasonable efforts should be made to arrange for student membership on any ad hoc board.

26. Except as provided in Part 25(a) of this *Code*, the decisions of each judicial board shall be regarded as a recommendation to the Dean of Students or a designee. The Dean of Students may approve a sanction of suspension or expulsion from the University with the concurrence of the Vice President for Academic Affairs or a designee.

Selection and Removal of Board Members

27. Members of each judicial board and the presiding officer are selected in accordance with procedures developed by the Dean of Students or a designee.

28. Members of any judicial board who are charged with any violation of this *Code* or with a criminal offense may be suspended from their judicial positions by the Dean of Students or a designee during the pendency of the charges against them. Members found guilty of any such violation or offense may be disqualified from any further participation in the University judicial system by the Dean of Students or a designee. Additional grounds and procedures for removal may be established by the Assistant Dean of Students.

Procedure—Disciplinary Conference

29. Students accused of offenses that may result in penalties less than expulsion or suspension from the University or eviction from University housing are subject to a disciplinary conference in the Office of Judicial Affairs or in the Office of Residential Life, as provided in Part 19. The following procedural protections are provided to respondents in disciplinary conferences:

a) Written notice of the specific charges at least three days prior to the scheduled conference.

b) Reasonable access to the case file prior to and during the conference. The case file consists of materials that would be considered "educational records" pursuant to the Family Educational Rights and Privacy Act of 1974; personal notes of University staff members or complainants are not included.

c) An opportunity to respond to the evidence and to call appropriate and relevant witnesses.

d) A right to an adviser, but only if applicable under Part 31.

Commentary

The conference procedure is designed to reduce unnecessary proceduralism and contentiousness in disciplinary proceedings. A disciplinary conference will normally consist of an informal, nonadversarial meeting between the respondent and a University administrator or an experienced member of the University Hearing Board, as designated by the Assistant Dean of Students. Complainants are not required to participate, unless cross-examination is necessary to resolve a dispositive factual issue. Documentary evidence and written statements can be relied upon, so long as the respondent is given access to them in advance and allowed to respond to them at the conference. Respondents are also allowed to call appropriate and relevant witnesses.

Procedure—Disciplinary Hearings

30. The following procedural guidelines shall be applicable in disciplinary hearings:

a) Respondents shall be given notice of the hearing date and the specific charges against them at least five calendar days in advance and shall be accorded reasonable access to the case file, which will be retained in the Office of Judicial Affairs.

b) The presiding officer may subpoena witnesses upon the motion of any board member or of either party and shall subpoena witnesses upon request of the Assistant Dean of Students. Subpoenas must be approved by the Assistant Dean of Students, and shall be personally delivered or sent by certified mail, return receipt requested. University students and employees are expected to comply with such subpoenas, unless compliance would result in significant and unavoidable personal hardship or substantial interference with normal University activities.

c) Respondents who fail to appear after proper notice will be deemed to have pled no contest to the charges pending against them. Nonetheless, the complainant will be required to present a prima facie case.

d) Hearings will be closed to the public, unless the respondent requests the presence of an adviser, who may be an attorney, in accordance with Part 31. A public hearing may be held, at the discretion of the presiding officer, if requested by the respondent.

e) The presiding officer shall exercise control over the proceedings to avoid needless consumption of time and to achieve orderly completion of the hearing. Any person, including the respondent, who disrupts a hearing may be excluded by the presiding officer or by the Assistant Dean of Students.

f) Hearings shall be tape-recorded or transcribed.

g) Any party may challenge a board member on the grounds of personal bias. Board members may be disqualified by the Assistant Dean of Students, or upon majority vote of the remaining members of the board, conducted by secret ballot.

h) Witnesses shall be asked to affirm that their testimony is truthful and may be subject to charges of intentionally providing false information to the University, pursuant to Part 11(f) of this *Code*.

i) Prospective witnesses, other than the complainant and the respondent, may be excluded from the hearing during the testimony of other witnesses. All parties, the witnesses, and the public shall be excluded during board deliberations.

j) The burden of proof shall be upon the complainant, who must establish the guilt of the respondent by a preponderance of the evidence. "Preponderance of the evidence" is that evidence which, when fairly considered, produces the stronger impression, has the greater weight, and is more convincing as to its truth when weighed against the evidence in opposition thereto.

k) Formal rules of evidence shall not be applicable in disciplinary proceedings conducted pursuant to this *Code*. The presiding officer shall give effect to the rules of confidentiality and privilege but shall otherwise admit all matters into evidence that reasonable persons would accept as having probative value. Repetitious or irrelevant evidence must, however, be excluded.

l) Complainants and respondents shall be accorded an opportunity to question those witnesses who testify for either party at the hearing.

m) Affidavits shall only be admitted into evidence if signed by the affiant and witnessed by the Assistant Dean of Students or a designee.

n) Every statement or assertion need not be proven. Board members may take judicial notice of matters that would be within the general experience of University students and faculty members. For example, board members may take notice that fire extinguishers in the residence halls are inspected once every week.

o) The Assistant Dean of Students may appoint a special presiding officer in complex cases. Special presiding officers may participate in board deliberations but shall not vote.

p) A determination of guilt shall be followed by a supplemental proceeding in which either party may submit evidence or make statements concerning the appropriate sanction to be imposed. The past disciplinary record of the respondent will only be supplied to the board during the supplementary proceeding.

q) Any determination of guilt will be supported by written findings that will be placed in the case file and made available to the respondent.

Representatives and Advisers

31. Representation is not permitted in University disciplinary hearings or conferences. Respondents may be accompanied by an adviser, who may be an attorney, ONLY in the following circumstances: (1) the respondent is referred for a *hearing*; or (2) the respondent is assigned to a *disciplinary conference*, AND criminal charges arising out of the same incident have been filed. The role of advisers shall be limited to consultation with respondents; advisers may not address the Board or question witnesses.

Commentary

A limitation upon participation by counsel is a natural outgrowth of the "investigatory" administrative hearing procedure used at The George Washington University and at most institutions of higher education. Investigatory proceedings are also used in many free societies around the world, even in criminal cases.

Unlike the passive jury in the adversarial model, the hearing panel in an investigatory proceeding assumes much of the responsibility for questioning witnesses and eliciting relevant evidence. This system gives more active control of the case to the decision maker and diminishes the role of counsel. Properly used, it also protects the legitimate interests of the student respondent, since complainants should be subject to thorough questioning by the hearing panel members. The Supreme Court has permitted considerable leeway in the development of procedures of this nature and held in *Matthews v. Eldridge* 424 U.S. 319, 348 (1976) that the traditional "judicial model is neither required, nor even the most effective method of decision-making in all circumstances. . ." A thoughtful law review article detailing some of the benefits of investigatory proceedings has been written by Judge Marvin F. Frankel; see "The Search For Truth: An Umpireal View," in 123 *University of Pennsylvania Law Review* 1031 (1975).

Student Groups and Organizations

32. Student groups and organizations may be charged with violations of this *Code*.

33. A student group or organization and its officers may be held collectively and individually responsible when violations of this *Code* by those associated with the group or organization have received the consent or encouragement of the group or organization or of the group's or organization's leaders or officers.

Commentary

A position of leadership in a student group or organization entails responsibility. Student officers cannot knowingly permit, condone, or acquiesce in any violation of this *Code* by the group or organization. For example, officers of a campus club who organize or supervise an activity such as a "scavenger hunt" must take reasonable precautions before, during, and after the event to prevent the misappropriation of property belonging to others. Failure to do so may result in a finding that the officers consented to any act of theft that may have occurred.

This part of the *Code* is also designed to hold a group or organization and its officers accountable for any act of hazing. For example, requiring, expecting, or encouraging a "pledge" to consume any drug (including alcohol) as a condition or prelude to membership or further participation in the organization would constitute a violation of Part 11(a) and (d). This is so because such an activity may cause "apprehension of harm" from the standpoint of a reasonable observer and constitutes an interference with normal University activities. The express or implied "consent" of the victim or participant is not a defense.

34. The officers or leaders or any identifiable spokesman for a student group or organization may be directed by the Dean of Students or a designee to take appropriate action designed to prevent or end violations of this *Code* by the group or organization. Failure to make reasonable efforts to comply with the Dean of Students' directive shall be considered a violation of Part 11(n) of this *Code*, both by the of-

ficers, leaders, or spokesperson for the group or organization and by the group or organization itself.

35. Sanctions for group or organization misconduct may include revocation or denial of registration, as well as other appropriate sanctions, pursuant to Part 12(g) of this *Code*.

Appeals

36. Any disciplinary determination resulting in expulsion or suspension from the University may be appealed by the respondent to the Committee on the Judicial System.

37. Requests for appeals must be submitted in writing to the Office of Judicial Affairs within five business days from the date of the letter notifying the respondent of the original decision. Failure to appeal within the allotted time will render the original decision final and conclusive.

38. A written brief in support of the appeal must be submitted to the Office of Judicial Affairs within seven business days from the date of the letter notifying the respondent of the original decision. Failure to submit a written brief within the allotted time will render the original decision final and conclusive.

39. Appeals shall be decided upon the record of the original proceedings and upon the written briefs submitted by the parties. New hearings shall not be conducted on appeal.

40. The Committee on the Judicial System may:

a) Affirm the finding and the sanction imposed by the original board.

b) Affirm the finding and reduce the sanction, in accordance with Parts 41 and 41(a) of this *Code*.

c) Remand the case to the original board, in accordance with Parts 41 and 41(b).

d) Dismiss the case, in accordance with Parts 41 and 41(c).

41. Deference shall be given to the determination of lower boards.

a) Sanctions may only be reduced if found to be grossly disproportionate to the offense.

b) Cases may be remanded to the original board if specified procedural errors or errors in interpretation of University regulations were so substantial as effectively to deny the respondent a fair hearing or if new and significant evidence became available that could not have been discovered by a properly diligent respondent before or during the original hearing.

c) Cases may be dismissed only if the finding is held to be unsupported by any evidence.

42. The imposition of sanctions will be deferred during the pendency of appellate proceedings unless, in the judgment of the Dean of Students, the continued presence of the student on the campus poses a substantial threat to himself or herself or to others or to the stability and continuance of normal University functions.

Transcript Notations

43. A temporary encumbrance may be placed on a student's University records by the Assistant Dean of Students while disciplinary proceedings are pending.

44. Permanent notation of disciplinary action will be made on the transcript whenever a student is expelled. Transcript notations of disciplinary action will also be made if a suspension is implemented, although students may petition for removal of the notation when the suspension period has expired. Such a petition may be granted at the discretion of the Dean of Students or a designee. Factors to be considered in reviewing petitions for notation removal after suspension include the present demeanor of the student, the student's conduct subsequent to the violation, and the nature of the violation, including the severity of any resulting damage, injury, or harm.

Disciplinary Files and Records

45. Case referrals may result in the development of a disciplinary file in the name of the respondent; the file shall be voided if the respondent is found innocent of the charges. Voided files will be so marked, shall not be kept with active disciplinary records, and shall not leave any student with a disciplinary record.

46. The files of respondents found guilty of any charges against them will be retained as a disciplinary record for three years from the date of the letter providing notice of final disciplinary action. Disciplinary records may be reported to third parties in accordance with University regulations.

47. Disciplinary records may be voided by the Assistant Dean of Students for good cause, upon written petition of respondents. Factors to be considered in review of such petitions shall include the present demeanor of the respondent, the conduct of the respondent subsequent to the violation, and the nature of the violation and the extent of any damage, injury, or harm resulting from it.

Committee on the Judicial System

48. The Committee on the Judicial System, appointed by the President, shall be composed of the following members: three faculty members, to be nominated by the Faculty Senate; three administrators, to be nominated by the Dean of Students; and three students, to be nominated by the President of the Student Association.

In addition to hearing appeals under Part 36, the Committee on the Judicial System shall be responsible for reviewing the *Code* and suggesting appropriate amendments or modifications. Any amendments or modifications that the Dean of Students may wish to implement shall be submitted to the Faculty Senate for its consent. Other tasks or assignments may also be referred to the Committee on the Judicial System, at the discretion of the Dean of Students.

May 1988

In addition to the Statement of Student Rights and Responsibilities and the Code of Student Conduct, the following are the principal regulations governing student conduct. They are quoted from official University documents (cited in parentheses following the title), which are available in the Dean of Students Office.

A. Violations of Law, Including Laws Proscribing Certain Drugs (Board of Trustees Resolution—October 19, 1968)

The University cannot condone violations of law, including violation of those laws that proscribe possession, use, sale, or distribution of certain drugs. Members of the academic community should know that administrative action, which may include dismissal from the residence halls, revocation of other privileges, or suspension or dismissal from the University, may be taken in order to protect the interests of the University and the rights of others.

B. Possession of Firearms (Facilities Use Policy)

It is prohibited to possess firearms, explosives, or other weapons on the premises of the University without the explicit authorization of the University, whether or not a federal or state license to possess the same has been issued to the possessor.

C. Unauthorized Entry (Facilities Use Policy)

It is prohibited to enter, without express or implied permission, onto the premises or into a facility or office; to refuse to vacate any University facility; to refuse to cease any unauthorized activity; to refuse to produce identification after being requested to do so by an Administrative Officer of the University, or by University Security Personnel; or to remain without authorization in any facility after closing hours.

D. Misuse of University Identification (Regulations Governing Student Identification Cards)

1. The student identification card (with picture) is not transferable. The owner of the card will be called upon to account for any fraudulent use of his or her identification card and will be subject to discipline by the University authorities if he or she has aided such fraudulent use. The card will be forfeited if the student to whom it was issued allows any other person to use the identification card.

2. At the end of each semester, or upon the owner's withdrawal from the University, all rights and privileges related to the identification card automatically cease, and in the event of withdrawal, the identification card must be surrendered to the office of the dean of the school in which the student enrolled or to the office of the Dean of Students.

3. Identification cards must be presented upon request of any University official or agent in the normal conduct of University business or service.

E. Animals in University Buildings (Facilities Use Policy)

No animals (including, but not limited to, dogs, cats, or birds) are allowed in any University building, with the exception of seeing-eye dogs.

F. Demonstration (Board of Trustees Resolution—October 19, 1968)

In the event a demonstration at this University exceeds the bounds of free assembly and lawful advocacy, and demonstrators are engaging in unlawful acts that cause or imminently threaten injury to persons or property, or that obstruct or interfere with normal and necessary University activities, the Board of Trustees affirms the authority of the President, or other University officials designated to act in his absence, to take such reasonable steps, if possible after consultation with the Chairman of the Executive Committee of the Faculty Senate and the President of the Student Body, as are required to restore and preserve order; including, if deemed necessary and appropriate, suspension of students or faculty engaging in such acts, and use of such law enforcement personnel as are needed to effect the removal, arrest, and prosecution of law violators. Any such suspension shall be reviewed by an appropriate tribunal as soon after order is restored as is practicably possible.

G. Disruption of University Functions (Board of Trustees Resolution—January 16, 1969)

Any member of the University (including as members of the University all persons having a formal connection with the University) who

1. engages in conduct that unreasonably obstructs teaching, research, and learning, or
2. unreasonably obstructs free access to members of the University or to University buildings, or
3. disobeys general regulations of the University, or
4. damages University property or injures members or guests of the University

may be punished for his conduct by dismissal from the University, or by some lesser disciplinary action, through procedures established within the University for the government of its members.

H. Political Activities (Resolution approved by the President—October 1970)

1. Neither the name nor seal of the University or any of its schools or institutions should be used on letters or other written material intended for political purposes, or activities.

2. No University office and no faculty or staff member's office should be used as a return mailing address for the solicitation of funds for political purposes, or the solicitation of endorsement of candidates for public office, or support for proposed legislation.

3. In political correspondence, the University title of a faculty or staff member should be used ony for identification and only when accompanied by a statement that the individual is speaking for himself and not as a representative of the University.

4. Whenever University duplicating machines, computers, or other equipment or supplies are used for political or other non-University purposes, their use must be fully compensated from private funds.

5. No office employee nor other employees of the University should be asked to perform tasks in any way related to political activities while on regular duty.

6. In no case should any action be taken that might implicate the University in any political activities.

7. In furtherance of the philosophy expressed in this resolution, the University has granted permission for recognized student organizations to use assigned University facilities for political activities in support of candidates for public office when such activities are directed within and for the University community.

I. Right to Change Rules (University Bulletin)

The University and its various academic units reserve the right to modify or change requirements, rules, and fees. Such regulations shall go into force whenever the proper authorities may determine.

J. Right to Dismiss Students (University Bulletin)

The right is reserved by the University to dismiss or exclude any student from the University, or from any class or classes, whenever, in the interest of the student or the University, the University administration deems it advisable.

It should be further noted that 1) students living in University residence halls are responsible for the Residence Hall Regulations and Policies that are attached to and a part of their leases, and 2) officers and members of student organizations are responsible for the Regulations Governing Student Organizations that are received upon registration of their organization at the Office of Campus Life.

Non-punitive Administrative Actions

In the course of University administration, faculty and administrators may take actions that have some coloring of punitive action but that, in fact, are not taken with intent to punish the student. Actions of this kind are necessary to the reasonable operation of the University, but care must be exercised that they do not become devices for avoiding the safeguards established to avoid unfair, arbitrary, or capricious invasions of student rights. An example is the refusal to reenroll a student with unpaid indebtedness to the University. Another example would be the refusal to reenroll a student with incapacitating psychological disturbances. Another example would be the requirement that a student pay for damage to University property caused by his or her negligence. These examples are illustrative, not a comprehensive description of these inherent administrative powers. These actions are not governed by the disciplinary procedures of the Statement of Student Rights and Responsibilities or by the Códe of Student Conduct.

UNIVERSITY POLICY ON ACADEMIC DISHONESTY

INTRODUCTION

The University community, in order to fulfill its purposes, must encourage the pursuit of academic excellence in an environment that promotes honesty, integrity, and fairness. All members of the community are expected to exhibit honesty and competence in their academic work and to share the responsibility to secure and respect general conditions conducive to an atmosphere of academic honesty.

It is the responsibility of University administrators to publicize appropriately the University Policy on Academic Dishonesty. Different schools and divisions may develop supplemental guidelines in conformity with this University policy and the *Statement of Student Rights and Responsibilities*, providing such guidelines are clearly publicized and made available to students and faculty.

It is the responsibility of department chairs to see that, if needed, supplemental guidelines for academic competence and honesty appropriate to their disciplines are developed and publicized.

Teachers of basic introductory courses, undergraduate and graduate, should recommend to students that they acquaint themselves with the University Policy on Academic Dishonesty. They must provide their students with a copy of any departmental guidelines developed to complement the Academic Dishonesty policy.

It is the responsibility of all students at the University to read and familiarize themselves with the University Policy on Academic Dishonesty. If the propriety of certain conduct, in light of the University community's norm of academic honesty, is in doubt, students must seek the advice of faculty.

Members of the academic community are presumed to be familiar with the University's academic procedures and are held responsible for applying them. Deliberate failure to act in accordance with such procedures is considered academic dishonesty. Failure to observe these procedures by reason of ignorance or inadvertence constitutes academic incompetence. A faculty member must decide whether to consider a student's noncompliance as an act of dishonesty or an act of incompetence. Although incompetence may be dealt with in the normal evaluative manner, acts of academic dishonesty must be treated as moral and intellectual offenses against the academic community and cannot be tolerated.

Students who feel aggrieved by the apparent inaction of faculty in matters of alleged academic dishonesty may appeal for action to the faculty member's department chair or dean.

Definition

Academic dishonesty is an act of fraud, which may include misrepresentation, deceit, falsification, or trickery of any kind that is done by the student with the purpose, intent, or expectation of influencing a grade or other academic evaluation. Academic dishonesty also includes forgery and falsification of University academic documents, intentionally impeding or damaging the academic work of others, or assisting other students in acts of dishonesty. Common examples of academically dishonest behavior include the following:

1. Cheating—intentionally using or attempting to use unauthorized materials, information, or study aids in any academic exercise; copying from another student's examination; submitting work prepared in advance for an in-class examination; representing material prepared by another as one's own work; violating rules governing administration of examinations.

2. Fabrication—intentional and unauthorized falsification or invention of any information or citation in an academic exercise.

3. Falsification and forgery of University academic documents—knowingly making a false statement, concealing material information, or forging a University official's signature on any University academic record or document. Such academic record or document may include the application for admission, add-drop forms, request for advanced standing, requests to register for graduate-level courses, etc. (Falsification or forgery of non-academic University documents, such as financial aid forms, shall be considered a violation of the non-academic student disciplinary code.)

4. Facilitating academic dishonesty—intentionally or knowingly helping or attempting to help another to commit an act of academic dishonesty.

5. Plagiarism—intentionally or knowingly

representing the words or ideas of another as one's own in any academic exercise; failure to attribute direct quotation, paraphrase, or borrowed facts or information.

All members of the academic community have a responsibility to prevent acts of academic dishonesty or, when they have occurred, to note and act upon them and keep them from recurring. Further, aiding, abetting, conspiring with, or assisting any other person to perform any act of academic dishonesty, when the person charged had reason to believe that academic dishonesty was involved, may properly be considered academic dishonesty. A more detailed definition of various types of academic dishonesty, where such have been promulgated, can be obtained from the appropriate department or dean's office.

The remainder of this statement aims at informing faculty, administrators, and students of their rights and responsibilities with respect to academic dishonesty. The procedures outlined below, including sanctions, apply to academic dishonesty only and shall not apply to cases of academic incompetence.

Initial Procedures

In all cases, a complainant who seeks to impose one or more sanctions must consult with his or her department chair or equivalent. The complainant will then be responsible for presenting the student with a completed copy of the "Charge of Academic Dishonesty" form, in which the nature of the charges as well as the proposed sanction are set forth. This must occur within two weeks of the time that the offense was brought to the complainant's attention. Upon presentation of the charges, the student will also be provided a copy of the current University Policy on Academic Dishonesty and the Statement of Student Rights and Responsibilities. The student is entitled to hear the complainant's evidence and to speak on his or her own behalf. Based on this meeting, should the complainant be persuaded that the student is innocent, the charges should be dropped and all records of the charges destroyed.

If the student agrees that the charge is accurate and that the sanction is appropriate, the fact of this agreement shall be noted by the signatures of both the student and complainant on the Charge form, and the sanction shall be imposed. A copy of the signed form shall be deposited with the dean of the school in which the student is enrolled.

Hearing

If the student believes that the charge is not accurate or that the sanction is not appropriate, the case shall be referred for hearing before the dean, or a representative of the dean, of the school in which the alleged offense occurred. If the complainant is a University official, the case shall be referred for hearing before the dean (or dean's representative) of the school in which the student is enrolled.

At the conclusion of the hearing, should the student be determined innocent by the dean (or dean's representative) and the complainant concurs, the charge shall be dropped and all records of the case destroyed. Otherwise, within seven calendar days of the conclusion of the informal hearing, the dean (or dean's representative) shall issue an opinion in writing, setting forth his or her findings of fact, conclusion, and the appropriate sanction. If the student and complainant agree with the opinion, this shall be noted in writing to be filed in the dean's office, and the sanction shall be imposed. If either the complainant or the student disagrees with the opinion, he or she must, within ten calendar days, file a written appeal with the Vice President for Academic Affairs requesting a review of the case by the Hearing Committee on Academic Dishonesty. The appeal must specify the points of disagreement and the remedy sought.

Sanctions

When faculty members or University officials (hereinafter, the "complainants") discover or have brought to their attention instances of apparent academic dishonesty, they must, upon consultation with their departmental chair or equivalent, act to invoke against the alleged offender one or more of the following sanctions:

1. Written reprimand from the dean. A record of this action shall be retained in the student's dean's office until the student graduates or for one year after termination of the student's enrollment.

2. Rejection of the work product, with the requirement that the student satisfactorily complete compensatory work. A record of this action shall be retained in the student's dean's office until the student graduates or for one year after termination of the student's enrollment.

3. A zero for the work product. A record of this action shall be retained in the student's dean's office until the student graduates or for two years after termination of the student's enrollment.

4. A grade of *F* for the course or other academic requirement. A record of this action shall be retained in the student's dean's office until the student graduates or for two years after termination of the student's enrollment.

5. A zero for the work product and notation of "Academic Dishonesty—Coursework" on the Registrar's record. A record of this action shall be retained in the student's dean's office until the student graduates or for two years after termination of the student's enrollment; the notation of "Academic Dishonesty—Coursework" shall be removed from the Registrar's record when the student graduates or two years after termination of the student's enrollment.

6. The notation "Academic Dishonesty—Not Coursework" on the Registrar's record. A record of this action shall be retained in the student's dean's office until the student graduates or for two years after termination of the student's enrollment; the notation of "Academic Dishonesty—Not Coursework" shall be removed from the Registrar's record when the student graduates or two years after termination of the student's enrollment.

7. A grade of *F* for the course or other academic requirement with notation of "Academic Dishonesty—Coursework" on the Registrar's record. A record of this action shall be retained in the student's dean's office until the student graduates or for two years after termination of the student's enrollment; the notation of "Academic Dishonesty—Coursework" shall be removed from the Registrar's record when the student graduates or two years after termination of the student's enrollment.

8. A grade of *F* for the course or other academic requirement, with the notation of "Academic Dishonesty—Coursework" permanently on the Registrar's record. The Registrar shall retain the record of this action.

9. The notation "Academic Dishonesty—Not Coursework" permanently on the Registrar's record. The Registrar shall retain the record of this action.

10. Suspension from the University for a period not to exceed one year or indefinite suspension from the University for a period exceeding one year and with conditions of readmission stated in the suspension notice. The notation "Academic Dishonesty—Coursework" (or "Academic Dishonesty—Not Coursework") shall remain permanently on the Registrar's record, with the Registrar retaining this record.

11. Expulsion from the University, with the notation "Academic Dishonesty—Coursework" (or "Academic Dishonesty—Not Coursework") remaining permanently on the Registrar's record, with the Registrar retaining this record.

The prior disciplinary record of a student may be considered in establishing the appropriate sanction to be imposed. It should not be a factor in the determination of guilt.

Appellate Review

The Appellate Review Committee on Academic Dishonesty shall be composed of a non-voting chair, three faculty members (two of whom shall be from the school in which the alleged offense occurred and at least one of whom shall be from the school in which the charged student is enrolled), and at the option of the accused student, two students enrolled in the school in which the offense occurred. The Vice President for Academic Affairs shall appoint the chair who shall constitute the Committee from a pool of faculty and students selected by the dean of each school. The Appellate Review Committee shall be convened within fifteen calendar days of the filing of an appeal.

The Appellate Review Committee will review the dean's (or the dean's representative's) opinion and all documentary evidence pertinent to the case. It may decide to dispose of the case on the basis of the evidence presented or may decide to hear new evidence. In the latter instance, the student must be present and will be allowed to disagree with and/or question the evidence or the witness. The student may be accompanied by an adviser of his or her choosing who may advise the student but may not speak on the student's behalf. The Appellate Review Committee may open these proceedings at the request of the student. If the Appellate Review Committee determines by majority vote that the student is not guilty, all records pertaining to the case will be destroyed. In all other cases, the Appellate Review Committee shall prepare an opinion summarizing the results of its review and including a determination of the sanction(s). The opinion of the Appellate Review Committee will be transmitted to the appropriate dean for the record and to the student, and the sanction shall be imposed and shall be final unless appealed to the Board of Trustees within fifteen calendar days.

Board of Trustees

If the student or faculty member believes that the charge(s) is/are not accurate or that the sanction(s) is/are not appropriate, the non-concurring party may request review by the

Board of Trustees through the Office of the Vice President for Academic Affairs.

Safeguards During Procedure

The reliance upon evidence shall be determined by fundamental principles of fair play and not upon strict rules of evidence or procedure as are customarily applied in courts of law.

Time Limits

While it is normally expected that the procedural steps set forth herein can and will be taken within the prescribed time limits, failure to do so shall not constitute a violation when extenuating circumstances reasonably excuse the delay.

Should appeal procedures not be completed before the "due date" for the semester grades, the faculty member shall record the grade "I" for the student until the charges have been finally adjudicated. For other academic requirements (e.g., theses, comprehensive examinations, etc.) no sanctions shall go into effect until the completion of all appeals that are to be undertaken.

May 1988

PRIVACY OF STUDENT RECORDS

The following statement of policy and procedures has been adopted in compliance with the provisions of the Family Educational Rights and Privacy Act, commonly referred to as the "Buckley Amendment."

I. Student Inspection and Review of Records

A. Policy. Any student, once enrolled at The George Washington University as a student of record, shall have the right to inspect and review records maintained in his or her name or directly related to him or her with the following exceptions:

1. Financial records of parents.
2. Confidential letters and statements of recommendation entered in the education record after January 1, 1975, to which the student has waived right of access.
3. Personal notes of institutional, supervisory, and educational personnel.
4. Campus law enforcement records, except reports of investigations and incidents that have been forwarded for action or information to other University officials.
5. Employee files, if the student is employed by the University.
6. Medical, psychological-counseling, and psychiatric records or case notes maintained by appropriate professional personnel. (Such records may, however, be reviewed personally with an appropriate professional of the student's choice.)
7. Admissions records on file in other component units (of the University) in which the student has not yet been enrolled.

B. Student Waiver of Right to Inspection and Review of Education Records. A student may waive his or her right to inspect and review confidential letters and statements of recommendation written on his or her behalf respecting admission to an educational institution, application for employment, or receipt of an honor or honorary recognition. It is understood that the University

1. Cannot require, as a condition of admission or award of financial aid, the waiving of right of access to letters of recommendation;
2. Must, upon request, furnish the name of all persons making confidential recommendations; and
3. Shall use such letters only for the purpose for which they were intended.

C. Types and Locations of Education Records Available for Student Inspection. Student requests to inspect and review records not excluded under A, above, should be made in person at the office responsible for the records the student wishes to review. A student may request a copy of data in his or her folder at the rate of $1.00 for the initial set and $0.10 for each additional sheet ordered at the same time. Exempted from such copying are all letters of recommendation and academic records from other institutions as well as other data considered confidential under the Act.

The Registrar's Office maintains a list of the officials of the University that maintain records available for student inspection and review under this policy. Included also are the office locations, the types of records maintained, and the title of the official responsible for such records.

II. Student Request for Amendment of Records

A. Policy. A student who believes that information in his or her education records is inaccurate or misleading or violates his or her privacy or other rights may request the University office maintaining such records to amend them.

B. Right to Hearing. A student's request to amend his or her record must be made in writing to the administrative officer in charge of the records involved and must clearly state the amendment(s) sought and the reasons therefor.

If the request is denied, the student will be advised of his or her right to a hearing to formally challenge the contents of the record and, if appropriate, to correct or delete any inaccurate, misleading, or inappropriate data contained therein or insert a written explanation respecting the contents of such record(s).

III. Disclosure of Personally Identifiable Information from Student Records

A. Policy. No personally identifiable information from the records of a student shall be disclosed without the prior written consent of the student to whom such records refer, except to the following persons and under the following conditions:

1. An individual requesting directory information, unless the student has filed a written request to withhold such information with the Office of the Registrar. Students must complete this form and leave it with the Registrar at the beginning of each semester if they wish to prohibit such data from being released.

Directory information includes name, local address, and telephone number; name and address of next of kin; dates of attendance; school, college, or division of enrollment; field of study; credit hours earned; degrees earned; honors received; weight, height, and age of members of athletic teams; and participation in organizations and activities chartered or otherwise established by the University, including intercollegiate athletics.

2. Personnel within the University who have a "legitimate educational interest."
3. Officials of other institutions in which the student seeks or intends to enroll, with the understanding that he or she will be so notified and access to a copy of the document will be granted if requested. NOTE: GWU will respond to such requests. By this statement, under the authority of the Buckley Amendment, no further specific notice to a student is necessary.
4. Certain government officials/agencies listed in the Buckley Amendment.
5. Persons and private and governmental (including foreign) agencies, in connection with a student's application for, or receipt of, financial aid.
6. Recognized organizations conducting studies and accrediting agencies desiring information, each with the understanding that personally identifiable data are not to be released or retained after its purpose is served.
7. Parents of dependent students (as defined in Section 152 of the Internal Revenue Code of 1954).

B. Procedure. All persons, other than the student and University employees with legitimate educational interest, seeking disclosure of personally identifiable information from education records, other than directory information, without the prior written consent of the student, must execute and file in the office maintaining the education records a written request clearly identifying the parties requesting the disclosure and their legitimate interest in the information sought. This form will be retained in the records of the student.

The University is required to make a reasonable effort to notify the student in the event of a subpoena of his or her record or a judicial order requiring the release of such data.

IV. Annual Notification of Rights

Students of record in attendance at the University will receive regular notice of their rights under the Buckley Amendment by annual publication in the *University Bulletin* and the *Student Handbook*.

Copies of the University's full policy statement required by the Buckley Amendment may be obtained from the Office of the Registrar.

Each student has the right to file a complaint with the Department of Education concerning alleged failure by the University to comply with the Buckley Amendment. The complaint should be addressed to: United States Department of Education, Family Policy Compliance Office, 400 Maryland Avenue, S.W., Washington, D.C. 20202-4605.

A FINAL WORD ABOUT SECURITY

While the campus area is a good deal safer than other areas of the city, all members of the University community are still encouraged to take reasonable precautions. Avoid deserted areas. Insofar as is possible, travel in groups and use facilities, such as washrooms, where there are other people. Do not leave personal belongings, particularly purses and wallets, unattended. Be aware that the campus is open, and protect yourself and others by reporting any suspicious person or event to Campus Security. It is not likely that you will be the victim of a theft or of a violent crime, such as rape or mugging, but being aware and thinking ahead makes such crimes even less likely.

Student Disciplinary Guidelines

Procedures Governing Academic and Non-Academic Misconduct and General Policies Governing Student Life

University of Wisconsin - Madison

CONTENTS

Introduction

Part I: Academic Misconduct, Chapter UWS 14

Part II: Non-Academic Misconduct, Chapter UWS 17

Part III: Conduct on University Lands, Portions of Chapter UWS 18

Part IV: University Policies on Use of Facilities and Outside Speakers

Part V: Nonresident Tuition

Part VI: Release of Student Records

Part VII: The Academic Calendar and Religious Observances

Part VIII: UW–Madison Student Photo ID Service Cards

INTRODUCTION

Academic and Nonacademic Misconduct

The disciplinary process, Chapter 14 of the UW Administrative Code for academic misconduct and Chapter 17 for non-academic misconduct, follows the basic tenets of due process.

The student shall have the right to confront and cross-examine witnesses against him/her, the right to present evidence and to be heard on his/her own behalf, the right to be represented by counsel at his/her own expense, and the right to a transcript of the proceedings at his/her own expense.

Adjudication of charges may be formal or informal depending on the penalties sought. All decisions may be appealed within a specified time period.

Whenever charges or appeals are pending, (UWS 17.07 (5)), a student under charges, unless temporarily suspended (UWS 17.12), shall continue to have the same rights and privileges accorded other students.

A student under temporary suspension is entitled to a preliminary hearing at the earliest opportunity.

A student under charges asking for suspension or expulsion may choose to have his/her case heard by either a hearing examiner or a Student Conduct Hearing Committee made up of three faculty members and three students.

In cases of alleged academic misconduct where the instructor has imposed a sanction after the required conference with the student, the decision may be appealed to the Academic Misconduct Review Committee.

Examples of charges that may result in temporary suspensions are enumerated in UWS 17.12.

A person who is suspended or expelled from the University may petition for re-admission.

PART I: ACADEMIC MISCONDUCT, Chapter UWS 14

Chapter UWS 14

STUDENT ACADEMIC DISCIPLINARY PROCEDURES

UWS 14.01	Statement of principles
UWS 14.02	Definitions
UWS 14.03	Academic misconduct subject to disciplinary action
UWS 14.04	Disciplinary sanctions
UWS 14.05	Procedures: disciplinary sanction imposed at the discretion of the instructor
UWS 14.06	Procedures: disciplinary sanction imposed following a report of academic misconduct by the instructor
UWS 14.07	Procedures: disciplinary sanction imposed following a report of academic misconduct by the investigating officer
UWS 14.08	Procedures: hearing
UWS 14.09	Appeal to the Chancellor
UWS 14.10	Discretionary appeal to the Board of Regents
UWS 14.11	Settlement
UWS 14.12	Effect of discipline within the university system
UWS 14.13	Right to petition for readmission
UWS 14.14	Investigating officer
UWS 14.15	Academic misconduct hearing committee: institutional option
UWS 14.16	Notice to students
UWS 14.17	Notice to instructors
UWS 14.18	Consistent institutional policies

UWS 14 — STUDENT ACADEMIC DISCIPLINARY PROCEDURES

UWS 14.01 STATEMENT OF PRINCIPLES: The board of regents, administrators, faculty, academic staff and students of the university of Wisconsin system believe that academic honesty and integrity are fundamental to the mission of higher education and of the university of Wisconsin system. The university has a responsibility to promote academic honesty and integrity and to develop procedures to deal effectively with instances of academic dishonesty. Students are responsible for the honest completion and representation of their work, for the appropriate citation of sources, and for respect of others' academic endeavors. Students who violate these standards must be confronted and must accept the consequences of their actions.

UWS 14.02 DEFINITIONS. In this chapter:

(1) "Academic misconduct" means an act described in s. UWS 14.03.

(2) "Academic misconduct hearing committee" means the committee or hearing examiner appointed pursuant to s. UWS 14.15 to conduct hearings under s. UWS 14.08.

(3) "Chancellor" means the chancellor or designee.

(4) "Days" means calendar days.

(5) "Disciplinary file" means the record maintained by the student affairs officer responsible for student discipline.

(6) "Disciplinary probation" means a status in which a student may remain enrolled in the university only upon the condition that the student complies with specified standards of conduct for a specified period of time, not to exceed 2 semesters.

(7) "Disciplinary sanction" means any action listed in s. UWS 14.04 taken in response to student academic misconduct.

(8) "Expulsion" means termination of student status with resultant loss of all student rights and privileges.

(9) "Hearing examiner" means an individual appointed by the chancellor in accordance with s. UWS 14.15 for the purpose of conducting a hearing under s. UWS 14.08.

(10) "Institution" means any university or center, or organizational equivalent designated by the board.

(11) "Instructor" means the faculty member or instructional academic staff member who has responsibility for the overall conduct of a course and ultimate responsibility for the assignment of the grade for the course.

(12) "Investigating officer" means an individual, or his or her designee, appointed by the chancellor of each institution to carry out certain responsibilities in the course of investigations of academic misconduct under this chapter.

(13) "Student" means any person who is registered for study in an institution for the academic period in which the misconduct occurred.

(14) "Student affairs officer" means the dean of students or student affairs officer designated by the chancellor to carry out duties described in this chapter.

(15) "Suspension" means a loss of student status for a specified length of time, not to exceed two years, with resultant loss of all student rights and privileges.

UWS 14.03 ACADEMIC MISCONDUCT SUBJECT TO DISCIPLINARY ACTION. (1) Academic misconduct is an act in which a student:

(a) Seeks to claim credit for the work or efforts of another without authorization or citation;

(b) Uses unauthorized materials or fabricated data in any academic exercise;

(c) Forges or falsifies academic documents or records;

(d) Intentionally impedes or damages the academic work of others;

(e) Engages in conduct aimed at making false representation of a student's academic performance; or

(f) Assists other students in any of these acts.

(2) Examples of academic misconduct include, but are not limited to: cheating on an examination; collaborating with others in work to be presented, contrary to the stated rules of the course; submitting a paper or assignment as one's own work when a part or all of the paper or assignment is the work of another; submitting a paper or assignment that contains ideas or research of others without appropriately identifying the sources of those ideas; stealing examinations or course materials; submitting, if contrary to the rules of a course, work previously presented in another course; tampering with the laboratory experiment or computer program of another student; knowingly and intentionally assisting another student in any of the above, including assistance in an arrangement whereby any work, classroom performance, examination or other activity is submitted or performed by a person other than the student under whose name the work is submitted or performed.

UWS 14.04 DISCIPLINARY SANCTIONS. (1) The following are the disciplinary sanctions that may be imposed for academic misconduct in accordance with the procedures of ss. UWS 14.05, 14.06 or 14.07:

(a) An oral reprimand;

(b) A written reprimand presented only to the student;

(c) An assignment to repeat the work, to be graded on its merits;

(d) A lower or failing grade on the particular assignment or test;

(e) A lower grade in the course;

(f) A failing grade in the course;

(g) Removal of the student from the course in progress;

(h) A written reprimand to be included in the student's disciplinary file;

(i) Disciplinary probation; or

(j) Suspension or expulsion from the university.

(2) One or more of the disciplinary sanctions listed in sub. (1) may be imposed for an incident of academic misconduct.

UWS 14.05 PROCEDURES: DISCIPLINARY SANCTION IMPOSED AT THE DISCRETION OF THE INSTRUCTOR. (1) Where an instructor concludes that a student enrolled in one of his or her courses has engaged in academic misconduct in the course, the instructor for that course may impose one or more of the following disciplinary sanctions, as listed under s. UWS 14.04(1)(a) through (c):

(a) An oral reprimand;

(b) A written reprimand presented only to the student; or

(c) An assignment to repeat the work, to be graded on its merits.

(2) No disciplinary sanction may be imposed under this section unless the instructor promptly offers to discuss the matter with the student. The purpose of this discussion is to permit the instructor to review with the student the bases for his or her belief that the student engaged in academic misconduct, and to afford the student an opportunity to respond.

(3) A student who receives a disciplinary sanction under this section has the right to a hearing before the academic misconduct hearing committee under s. UWS 14.08 to contest the determination that academic misconduct occurred, or the disciplinary sanction imposed, or both. If the student desires such a hearing, he or she must file a written request with the student affairs officer within 10 days of imposition of the disciplinary sanction by the instructor.

UWS 14.06 PROCEDURES: DISCIPLINARY SANCTION IMPOSED FOLLOWING A REPORT OF ACADEMIC MISCONDUCT BY THE INSTRUCTOR. Where an instructor believes that a student enrolled in one of his or her courses has engaged in academic misconduct and the sanctions listed under s. UWS 14.04(1)(a) through (c) are inadequate or inappropriate, the instructor may proceed in accordance with this section to impose, subject to hearing rights in s. UWS 14.08, one or more of the disciplinary sanctions listed under s. UWS 14.04(1)(d) through (h).

(1) CONFERENCE WITH STUDENT. When an instructor concludes that proceedings under this section are warranted, the instructor shall promptly offer to discuss the matter with the student. The purpose of this discussion is to permit the instructor to review with the student the bases for his or her belief that the student engaged in academic misconduct, and to afford the student an opportunity to respond.

(2) DETERMINATION BY THE INSTRUCTOR THAT NO ACADEMIC MISCONDUCT OCCURRED. If, as a result of a discussion under sub. (1), the instructor determines that academic misconduct did not in fact occur or that no disciplinary sanction is warranted under the circumstances, the matter will be considered resolved without the necessity for further action or a written report.

(3) PROCESS FOLLOWING DETERMINATION BY THE INSTRUCTOR THAT ACADEMIC MISCONDUCT OCCURRED.

(a) If, as a result of a discussion under sub. (1), the instructor determines that academic misconduct did occur and that one or more of the disciplinary sanctions listed under s. UWS 14.04(1)(d) through (h) should be recommended, the instructor shall prepare a written report so informing the student, which shall contain the following:

1. A description of the misconduct;

2. Specification of the sanction recommended;

3. Notice of the student's right to request a hearing before the academic misconduct hearing committee; and

4. A copy of the institutional procedures adopted to implement this section.

(b) The written report shall be delivered personally to the student or be mailed to the student by regular first class United States mail at his or her current address, as maintained at the institution. In addition, copies of the report shall be provided to the institution's student affairs officer and to others authorized by institutional procedures.

(c) A student who receives a written report under this section has the right to a hearing before the academic misconduct hearing committee under s. UWS 14.08 to contest the determination that academic misconduct occurred, or the choice of disciplinary sanction, or both. If the student desires the hearing before the academic misconduct hearing committee, the student must file a written request with the student affairs officer within 10 days of personal delivery or mailing of the written report. If the student does not request a hearing within this period, the determination of academic misconduct shall be regarded as final, and the disciplinary sanction recommended shall be imposed.

(4) PROCESS FOLLOWING DETERMINATION BY THE INSTRUCTOR THAT DISCIPLINARY PROBATION, SUSPENSION OR EXPULSION MAY BE WARRANTED.

(a) If, as a result of a discussion under sub. (1), the instructor determines that academic misconduct did occur and that disciplinary probation, suspension or expulsion under s. UWS 14.04(1)(i) or (j) should be recommended, the instructor shall provide a written report to the investigating officer, which shall contain the following:

1. A description of the misconduct; and

2. Specification of the sanction recommended.

(b) Upon receipt of a report under this subsection, the investigating officer may proceed, in accordance with s. UWS 14.07, to impose a disciplinary sanction.

UWS 14.07 PROCEDURES: DISCIPLINARY SANCTION IMPOSED FOLLOWING A REPORT OF ACADEMIC MISCONDUCT BY THE INVESTIGATING OFFICER. The investigating officer may proceed in accordance with this section to impose, subject to hearing and appeal rights, one or more of the disciplinary sanctions listed in s. UWS 14.04(1)(g) through (j).

(1) AUTHORITY OF INVESTIGATING OFFICER. The investigating officer may proceed in accordance with this section when he or she receives information that a student at the institution has engaged in alleged academic misconduct and:

(a) Some or all of the alleged academic misconduct occurred outside the scope of any course for which the involved student is currently registered;

(b) The involved student has previously engaged in academic misconduct subject to the disciplinary sanctions listed in s. UWS 14.04(1)(d) through (j);

(c) The alleged misconduct would, if proved to have occurred, warrant a sanction of disciplinary probation, suspension or expulsion; or

(d) The instructor in the course is unable to proceed.

(2) CONFERENCE WITH STUDENT. When the investigating officer concludes that proceedings under this section are warranted, he or she shall promptly offer to discuss the matter with the student. The purpose of this discussion is to permit the investigating officer to review with the student the bases for his or her belief that the student engaged in academic misconduct, and to afford the student an opportunity to respond.

(3) CONFERENCE WITH INSTRUCTOR. An investigating officer proceeding under this section shall discuss the matter with an involved instructor. This discussion may occur either before or after the conference with the student. It may include consultation with the instructor on the facts underlying the alleged academic misconduct and on the propriety of the recommended sanction.

(4) DETERMINATION BY THE INVESTIGATING OFFICER THAT NO ACADEMIC MISCONDUCT OCCURRED. If, as a result of discussions under subs. (2) and (3), the investigating officer determines that academic misconduct did not in fact occur or that no disciplinary sanction is warranted under the circumstances, the matter will be considered resolved without the necessity for further action or a written report.

(5) PROCESS FOLLOWING DETERMINATION BY THE INVESTIGATING OFFICER THAT ACADEMIC MISCONDUCT OCCURRED.

(a) If, as a result of discussions under subs. (2) and (3), the investigating officer determines that academic misconduct did occur and that one or more of the disciplinary sanctions listed under s. UWS 14.04(1)(g) through (j) should be recommended, the investigating officer shall prepare a written report so informing the student, which shall contain the following:

1. A description of the misconduct;

2. Specification of the sanction recommended;

3. Notice of the student's right to a hearing before the academic misconduct hearing committee; and

4. A copy of the institutional procedures adopted to implement this section.

(b) The written report shall be delivered personally to the student or mailed to the student by regular first class United States mail at his or her current address, as maintained at the institution. In addition, a copy of the report shall be provided to the instructor and to the institution's student affairs officer.

(c) A student who receives a written report under this section has the right to a hearing before the academic misconduct hearing committee under s. UWS 14.08 to contest the determination that academic misconduct occurred, or the choice of disciplinary sanction, or both.

1. Except in cases where the disciplinary sanction recommended is disciplinary probation, suspension or expulsion, if the student desires the hearing before the academic misconduct hearing committee, the student must file a written request with the student affairs officer within 10 days of personal delivery or mailing of the written report. If the student does not request a hearing within this period, the determination of academic misconduct shall be regarded as final, and the disciplinary sanction recommended shall be imposed.

2. In cases where the disciplinary sanction recommended is disciplinary probation, suspension or expulsion, the student affairs officer shall, upon receipt of the written report under par. (b), proceed under s. UWS 14.08 to schedule a hearing on the matter. The purpose of the hearing shall be to review the determination that academic misconduct occurred and the disciplinary sanction recommended. A hearing will be conducted unless the student waives, in writing, the right to such a hearing.

UWS 14.08 PROCEDURES: HEARING. (1) If a student requests a hearing, or a hearing is required to be scheduled under s. UWS 14.07(5)(c)2, the student affairs officer shall take the necessary steps to convene the academic misconduct hearing committee and shall schedule the hearing within 10 days of receipt of the request or written report, unless a different time period is mutually agreed upon by the student, instructor or investigating officer, and the members of the hearing committee.

(2) Reasonably in advance of the hearing, the committee shall obtain from the instructor or investigating officer, in writing, a full explanation of the facts upon which the determination of misconduct was based, and shall provide a copy of Chapter UWS 14 to the student.

(3) The hearing before the academic misconduct hearing committee shall be conducted in accordance with the following requirements:

(a) The student shall have the right to question adverse witnesses, the right to present evidence and witnesses, and to be heard in his or her own behalf, and the right to be accompanied by a representative of his or her choice.

(b) The hearing committee shall not be bound by common law or statutory rules of evidence and may admit evidence having reasonable probative value, but shall exclude immaterial, irrelevant, or unduly repetitious testimony, and shall give effect to recognized legal privileges.

(c) The hearing committee shall make a record of the hearing. The record shall include a verbatim record of the testimony, which may be a sound recording, and a file of the exhibits offered at the hearing. Any party to the hearing may obtain copies of the record at his or her own expense. Upon a showing of indigency and legal need, a party may be provided a copy of the verbatim record of the testimony without charge.

(d) The hearing committee shall prepare written findings of fact and a written statement of its decision based upon the record of the hearing.

(e) The hearing committee may find academic misconduct and impose a sanction of suspension or expulsion only if the proof of such misconduct is clear and convincing. In other cases, a finding of misconduct must be based on a preponderance of the credible evidence.

(f) The committee may impose a disciplinary sanction that differs from the recommendation of the instructor or investigating officer.

(g) The instructor or the investigating officer or both may be witnesses at the hearing conducted by the committee, but do not have responsibility for conducting the hearing.

(h) The decision of the hearing committee shall be served upon the student either by personal delivery or by first class United States mail and shall become final within 10 days of service, unlessan appeal is taken under s. UWS 14.09.

UWS 14.09 APPEAL TO THE CHANCELLOR. (1) Where the sanction prescribed by the hearing committee is suspension or expulsion, the student may appeal to the chancellor to review the decision of the hearing committee on the record. In such a case, the chancellor shall sustain the decision of the academic misconduct hearing committee unless the chancellor finds:

(a) The evidence of record does not support the findings and recommendations of the hearing committee;

(b) Established procedures were not followed by the academic misconduct hearing committee and material prejudice to the student resulted; or

(c) The decision was based on factors proscribed by state or federal law regarding equal educational opportunities.

(2) If the chancellor makes a finding under sub. (1), the chancellor may remand the matter for consideration by a different hearing committee, or, in the alternative, may invoke an appropriate remedy of his or her own.

UWS 14.10 DISCRETIONARY APPEAL TO THE BOARD OF REGENTS. Institutional decisions under ss. UWS 14.05 through 14.09 shall be final, except that the board of regents may, at its discretion, grant a review upon the record.

UWS 14.11. SETTLEMENT. The procedures set forth in this chapter do not preclude a student from agreeing that academic misconduct occurred and to the imposition of a sanction, after proper notice has been given. Required written reports, however, may not be waived.

UWS 14.12 EFFECT OF DISCIPLINE WITHIN THE UNIVERSITY SYSTEM. Suspension or expulsion shall be systemwide in effect.

(1) A student who is suspended or expelled from one institution in the university of Wisconsin system may not enroll in another institution in the system unless the suspension has expired by its own terms or one year has elapsed after the student has been suspended or expelled.

(2) Upon completion of a suspension period, a student may re-enroll in the institution which suspended him or her as if no suspension had been imposed.

UWS 14.13 RIGHT TO PETITION FOR READMISSION. A student who has been expelled may petition for readmission, and a student who has been suspended may petition for readmission prior to the expiration of the suspension period. The petition for readmission must be in writing and directed to the chancellor of the institution from which the student was suspended or expelled. The petition may not be filed before the expiration of one year from the date of the final determination in expulsion cases, or before the expiration of one-half of the suspension period in suspension cases. The chancellor shall, after consultation with elected representatives of the faculty, academic staff, and students, adopt procedures for determining whether such petitions will be granted or denied.

UWS 14.14 INVESTIGATING OFFICER. The chancellor of each institution, in consultation with faculty, academic staff, and student representatives, shall designate an investigating officer or officers for student academic misconduct. The investigating officer shall have responsibility for investigating student academic misconduct and initiating procedures for academic misconduct under s. UWS 14.07. An investigating officer may also serve on the academic misconduct hearing committee for a case, if he or she has not otherwise been involved in the matter.

UWS 14.15 ACADEMIC MISCONDUCT HEARING COMMITTEE: Institutional option. The chancellor of each institution, in consultation with faculty, academic staff, and student representatives, shall adopt policies providing for the establishment of a student academic misconduct hearing committee or designation of a hearing examiner to fulfill the responsibilities of the academic misconduct hearing committee in this chapter.

(1) A student academic misconduct hearing committee shall consist of at least three persons, including a student or students, and the presiding officer shall be appointed by the chancellor. The presiding officer and at least one other member shall constitute a quorum at any hearing held pursuant to due notice.

(2) A hearing examiner shall be selected by the chancellor from the faculty and staff of the institution.

UWS 14.16 NOTICE TO STUDENTS. Each institution shall publish and make freely available to students copies of Chapter UWS 14 and any institutional policies implementing Chapter UWS 14.

UWS 14.17 NOTICE TO INSTRUCTORS. Each institution shall adopt procedures to ensure that instructors are familiar with these policies. Each institution shall provide instructors with copies of Chapter UWS 14 and any institutional policies implementing Chapter UWS 14 upon employment with the university, and each department chair shall be provided such copies upon assuming the duties of the chair.

UWS 14.18 CONSISTENT INSTITUTIONAL POLICIES. Each institution is authorized to adopt policies consistent with this chapter. A copy of such policies shall be filed with the board of regents and the university of Wisconsin system office of academic affairs.

PART II: NON-ACADEMIC MISCONDUCT, Chapter UWS 17

INTRODUCTION

Chapter UWS 17 is an administrative code adopted by the Board of Regents as a set of disciplinary procedures for the University System. These procedures describe the actions which the University may take in response to student misconduct; they define non-academic misconduct which is prohibited; and they outline procedures which are to be used in resolving allegations of misconduct. (Academic misconduct is covered in UWS 14).

At several specified points in those system-wide procedures, the Board of Regents either directed or allowed each institution to adopt definitions or procedures which may be unique to individual universities but which are consistent with the system-wide guidelines.

The wording in the following statement of University of Wisconsin–Madison student disciplinary procedures is, for the most part, identical to that in UWS 17 as adopted by the Board of Regents. Any procedures or definitions which have been adopted specifically by this University to implement UWS 17 are identified by italics.

Chapter UWS 17

STUDENT NONACADEMIC DISCIPLINARY PROCEDURES

UWS 17.01 Policy statement
UWS 17.02 Definitions
UWS 17.03 Right to petition for readmission
UWS 17.04 Effect of discipline within the university system
UWS 17.05 System-wide disciplinary authority
UWS 17.06 Offenses defined
UWS 17.07 Disciplinary procedure
UWS 17.08 Student conduct hearing tribunal: student option
UWS 17.09 Discipline involving suspension or expulsion
UWS 17.10 Appeal to the Board of Regents
UWS 17.11 Intermediate appeals; campus option
UWS 17.12 Temporary suspension
UWS 17.14 Notice to students

UWS 17.01 POLICY STATEMENT. The Board of Regents of the University of Wisconsin system adopts the following policy on the standards and procedures for student discipline in the University system, acknowledging both the need to preserve the orderly processes of the University with regard to its teaching, research, and public service missions, as well as the need to observe the student's procedural and substantive rights.

UWS 17.02 DEFINITIONS. (1) "Chancellor" means the chancellor or designee.

(2) "Investigating officer" means investigating officer or designee.

(3) "Student," for the purpose of this chapter, means any person who is registered for study in any institution in the university for the current academic period. A person shall be considered a student during any period which follows the end of an academic period which the student has completed until the last day for registration for the next succeeding academic period or until 14 calendar days have elapsed after the commencement of classes for the next succeeding academic period, whichever occurs first.

(4) "Disciplinary sanction" or "sanction" means any action affecting the status of an individual as a student which is taken by the university in response to student nonacademic misconduct. The term shall include probation, resignation or leave for misconduct, suspension or expulsion, written reprimand, denial of particular university privileges, and other less severe actions not enumerated herein. Disciplinary sanctions shall not include cut-off or revocation of a student's financial aids; however, this shall not be interpreted as precluding the individual operation of rules or standards governing eligibility for student financial aid under which the imposition of a disciplinary sanction could result in disqualification of the student for financial aid. Each institution is authorized to adopt a more explicit listing of sanctions and actions which is consistent with the provisions of this section.

(5) "Probation" means that the student is permitted to remain enrolled in the university only upon condition that he/she comply with all university rules or regulations or with other standards of conduct which the student is directed to observe for the duration of the period of the probation and which may include loss of student privileges except those of attending classes and writing examinations. Probation may not exceed 2 semesters in duration for any given misconduct, except that violation of probationary conditions shall be cause for extension of the probation for more than 2 additional semesters or for suspension or expulsion.

(6) "Suspension" means a temporary loss of student status for a specified period of time, not to exceed 2 years, with resultant loss of all student rights and privileges. Upon completion of suspension, the student shall have the same standing to re-enroll as he/she would have had if no suspension had been imposed.

(7) "Expulsion" means termination of student status with resultant loss of all student rights and privileges.

(8) "Instructor" for the purposes of this chapter means the faculty member who has responsibility for the overall conduct of a course and ultimate responsibility for the assignment of the grade for the course.

(9) "Institution" means any university, or an organizational equivalent designated by the board.

(10)"Days" means calendar days.

(11)"Intentional conduct" means conduct which the student knew or reasonably should have known would result in conduct prohibited by this chapter.

(12)"Members of the university community" means students and employes of the university.

UWS 17.03 RIGHT TO PETITION FOR READMISSION. (1) A person who is suspended or expelled may petition for readmission to the University of Wisconsin–Madison after one year has elapsed from the date of the final determination in expulsion cases or after one-half of the final determination in expulsion cases or after one-half of the suspension period has elapsed in suspension cases.

The petition shall be submitted in writing to the investigating officer who shall review the circumstances of the case and advise the Chancellor in writing with a copy to the petitioner. Within five (5) calendar days after receiving the results of the investigating officer's review, the petitioner may request that the Chancellor seek additional advice from a three-person re-admission tribunal appointed for that purpose, whose members shall be a representative of the University Committee who shall serve as chairperson, a student appointed by the President of the Wisconsin Student Association and a representative of the Dean of the college in which the petitioner was last enrolled. A quorum of this committee shall be two members.

The readmission tribunal shall proceed informally and shall provide the petitioner and the investigating officer with an opportunity to present their positions in person or in writing. The tribunal shall submit its advice to the Chancellor in writing with a copy to the petitioner and to the investigating officer.

The Chancellor's decision to grant or deny the petition shall be final.

(2) *The following factors shall be considered in readmission proceedings: the severity of the original offense and the likelihood that the misconduct which resulted in suspension or expulsion will not be repeated or that other serious misconduct in violation of UWS 17 will not occur.*

UWS 17.04 EFFECT OF DISCIPLINE WITHIN THE UNIVERSITY SYSTEM. Suspension or expulsion shall be system-wide in effect. A student who is suspended or expelled from one institution in the University of Wisconsin system may not enroll in another institution in the system unless the suspension has expired by its own terms or one year has elapsed after the student has been suspended or expelled.

UWS 17.05 SYSTEM-WIDE DISCIPLINARY AUTHORITY. The investigating officer for the institution at which a student was enrolled at the time that acts in violation of this chapter were alleged to have been committed by the student shall have authority to institute disciplinary proceedings against such student, notwithstanding that the institution against which the acts were alleged to have been committed is not the same institution at which the student was enrolled at the time of the commission of such acts.

(1) For intentional conduct which constitutes a serious danger to the personal safety of other members of the university community or guests. In order to illustrate the types of conduct which this paragraph is designed to cover, the following examples are set forth. These examples are not meant to illustrate the only situations or types of conduct intended to be covered.

UWS 17.06 OFFENSES DEFINED. The university may discipline a student in non-academic matters in the following situations.

(1) For intentional conduct which constitutes a serious danger to the personal safety of other members of the university community or guests. In order to illustrate the types of conduct which this paragraph is designed to cover, the following examples are set forth. These examples are not meant to illustrate the only situations or types of conduct intended to be covered.

Special Note: This provision is intended to cover a broad range of intentional conduct threatening personal safety including the four degrees of criminal sexual contact or sexual intercourse with another person without that person's consent as defined in Section 940.225, Wisconsin Statutes.

(a) A student would be in violation if he or she attacked or otherwise physically abused, threatened to physically injure, or physically intimidated a member of the university community or a guest because of that person's race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.

(b) A student would be in violation if he/she attacked or threw rocks or other dangerous objects at law enforcement personnel whose services had been retained or called for to protect members of the university community or university property, or if he/she incited others to do so when he/she knew or reasonably should have known that such conduct would result.

(c) A student would be in violation if he/she sold or delivered a controlled substance as defined by the Wisconsin Uniform Controlled Substance Act (ch. 161, Stats.) or if he/she possessed a controlled substance with intent to sell or deliver. For the purposes of this section "delivery" shall be defined as a delivery prohibited by ch. 161, Stats.

(d) A student would be in violation if he/she removed, tampered with, or otherwise rendered useless university equipment or property intended for use in preserving or protecting the safety of members of the university community such as fire exit signs, extinguishers, alarms, or hoses, first aid equipment, or emergency telephones, or if he/she obstructed or caused to be inoperable fire escape routes such as stairwells or elevators.

(2)(a) For addressing directly to a specific member, or specific members, of the university of Wisconsin system student body an epithet, as defined in par. (b), that is:

1. Intended to demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the person addressed; and

2. Intended to make the environment at the university hostile or threatening for the person addressed because of his or her race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.

(b) In this subsection, "epithet" means a word, phrase or symbol that reasonable persons recognize to grievously insult or threaten persons because of their race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age, and that:

1. Would make the educational environment hostile or threatening for a person to whom the word, phrase or symbol is directly addressed; and

2. Without regard to the gender or other physical characteristics of the individuals involved, would tend to provoke an immediate violent response when addressed directly to a person of average sensibility who is a member of the group that the word, phrase or symbol insults or threatens.

(c) The use of epithets in statements addressed to a general audience rather than directly to a specific individual, or specific individuals, shall not be a violation of this subsection even though the speaker's intent is to demean and create a hostile environment and even though a member or members of the group demeaned by the epithet constitute part of that audience.

(d) The intent of a person charged with violating this subsection shall be determined by consideration of all relevant circumstances.

(e) No disciplinary proceeding under this subsection shall be instituted unless a person designated by the president of the university of Wisconsin system has determined that the conduct alleged to have occurred constitutes a violation of this subsection. If disciplinary proceedings are thereafter instituted, and a violation is found, the proposed disciplinary sanction shall also be reviewed by the President's designee to assure that it is appropriate to the offense and comparable to sanctions that have been imposed for similar violations.

(3) For intentional conduct that seriously damages or destroys university property or attempts to seriously damage or destroy university property.

(4) For intentional conduct that obstructs or seriously impairs or attempts to obstruct or seriously impair university-run or university-authorized activities on any campus, including activities either outdoors or inside a classroom, office, lecture hall, library, laboratory, theater, union, residence hall, or other place where a university-run or university-authorized activity is carried on. The kind of intentional conduct referred to is conduct which by itself or in conjunction with the conduct of others prevents the effective carrying on of the activity — -a result which the student knew or reasonably should have known would occur. In order to illustrate types of conduct which this paragraph is designed to cover, the following examples are set out. These examples are not meant to illustrate the only situations or types of conduct intended to be covered.

(a) A student would be in violation if he/she participated in conduct which he/she knew or should have known would prevent or block physical entry to, or exit from, a university building, corridor, or room to anyone apparently entitled to enter or leave in connection with a univeristy-run or university-authorized activity.

(b) A student would be in violation if, in attending a speech or program on campus sponsored by or with permission of the university, he/she engaged in shouted interruptions, whistling, derisive laughter, or other means which by itself or in conjunction with the conduct of others prevented or seriously interfered with a fair hearing of the speech or program, under circumstances where the student knew or reasonably should have known this would occur.

(c) A student would be in violation if in a classroom he/she used techniques similar to those specified in the preceding paragraph, or filibuster-type tactics or other tactics, which by themselves or in conjunction with the conduct of others, prevented or seriously interfered with the carrying on of the teaching and learning process, under circumstances where the student knew or reasonably should have known this would occur.

(d) A student would be in violation if he/she intentionally obstructed a university official or employe engaged in the lawful performance of his/her duties.

(e) A student would be in violation if he or she removed pages from library books or parts of other materials or caused books or materials to be unavailable for use by others by removing them from their proper place without proper authorization or by hiding them in the library so that they are not available in the usual manner to persons wishing to use them.

(5) For unauthorized possession of university property or property of another member of the university community.

(6) For acts which violate the provisions concerning parking, traffic, I.D. cards, university keys, drugs, smoking in unauthorized places, carrying firearms, unauthorized peddling, unauthorized use of sound-amplifying equipment, and other subjects covered by the published University of Wisconsin System Administrative Code (ch. UWS 18).

(7) For making a knowingly false statement, either orally or in writing, to any university employe or agent on a university-related matter.

17.07 DISCIPLINARY PROCEDURE.

(1) *The Chancellor, after consultation with the University Committee and with the elected officers of the Wisconsin Student Association, shall designate a person as "investigating officer" who shall investigate cases of student conduct alleged to be in violation of sec. 17.06. Where it appears that a violation has occurred, the investigating officer shall proceed in accordance with the provisions of this chapter.*

(2) Formal adjudication. If the maximum sanction sought by the investigating officer includes suspension or expulsion, the procedures in s. UWS 17.09 shall apply and the investigating officer shall cause a statement of charges to be prepared and served upon the student involved. The statement of charges shall contain:

(a) A concise summary — giving dates, time, place, and events — of the facts or conduct on which the charge is based.

(b) A citation to and quotation from the rule(s) alleged to have been violated.

(c) A statement of the maximum penalty sought by the investigating office, *including the possibility that the penalty may be enhanced as in 17.07(7).*

(d) An explanation of the consequences of failure to answer the statement of charges.

(e) Statements as to whether the university will or will not be represented by counsel and that the student may be represented by a person of his/her choice, including legal counsel, at his/her own expense.

(f) A copy of this chapter.

(3) Informal adjudication. (a) If the maximum penalty sought does not include suspension or expulsion, the investigating officer may proceed with informal adjudication except that if adjudication in this manner would result in disqualifying the student for financial aids, the procedures in sec. 17.09 shall apply. The investigating officer shall provide the student with a concise written summary of the facts or conduct on which the charge is based, a citation to and quotation from the rule(s) alleged to have been violated, a statement of the maximum penalty which may result, including the possibility that the penalty may be enhanced as in 17.07(7), and notice of and an opportunity for a hearing at which the student may be represented by a person of his/her choice. At the informal hearing, the evidence against the student shall be reviewed and the student shall have an opportunity to present evidence and argument, including a written statement, to refute the charge. After the hearing, the investigating officer shall provide the student a written decision which shall include findings of fact and conclusions and notification of the student's right to appeal the decision to the Informal Adjudication Review Committee.

1. *The student may initiate an appeal of this decision by notifying the investigating officer in writing within five (5) days from service of the investigating officer's written decision.*

2. The Informal Adjudication Review Committee shall be three (3) students (from different years and classifications) who are appointed annually by the President of the Wisconsin Student Association with the consent of the Senate, three (3) faculty members (from different divisions) who are appointed annually by the Chancellor after consultation with the divisional committees, and the investigating officer who shall serve as an ex-officio, non-voting member. The Chancellor shall designate one of the committee members as chairperson. A quorum shall be three (3) voting members.

3. *The committee shall meet to establish review procedures. These procedures shall include an opportunity for the student or his/her representative to be heard or to submit a written statement, and a written notification to the student from the committee of its conclusions.*

4. The function of the committee shall be to review the evidence upon which the investigating officer based his or her findings of fact and to review the disciplinary action taken. The committee shall determine whether or not the evidence provides a reasonable basis for the resulting findings of fact and disciplinary sanction. If the committee concludes that the evidence does not provide a reasonable basis for the decision, it shall either dismiss the charge against the student or direct the investigating officer to reduce the University disciplinary sanction as appropriate.(b) If, during informal adjudication, the investigating officer concludes that suspension or expulsion should be sought rather than a lesser sanction, the investigating officer may cause a statement of charges to be served upon the student in accordance with sub. (2), in which event the procedures in s. UWS 17.09 shall apply.

(4) Settlement. Nothing contained in this chapter shall prevent the student, during an investigation of alleged misconduct, during informal adjudication, or after a statement of charges has been served but prior to a hearing provided in accordance with s. UWS 17.09, from submitting a written resignation from the university.

(a) In the event of such resignation, the investigating officer shall impose such sanction as he deems appropriate consistent with the statement of charges; provided, however, the student may, within 10 calendar days after receiving notice of the imposition of such sanction, request a hearing as provided by s. UWS 17.07.

(b) Nothing contained in this chapter shall limit the right of the university and the student during an investigation of alleged misconduct, during informal adjudication, or after a statement of charges has been served, to agree to a disciplinary sanction if the student agrees not to contest the charges (pleads "no contest"). Any such agreement shall be reduced to writing which, when signed by the student, shall conclude the case.

(5) Whenever charges or appeals under this chapter are pending, a student under charges, unless temporarily suspended pursuant to sec. 17.12 of this chapter, shall continue to have the same rights and privileges accorded other students. However, grades or diplomas shall be withheld pending final determination of charges that could result in suspension or expulsion, except that a current transcript shall be issued at the request of the student but it may contain the notation "Disciplinary Charges Pending" on the face thereof.(6) Service of notice or decisions. Each student shall be responsible for maintaining on file with the office specified by each institution current school and permanent home addresses. Notification of these addresses shall be in writing.

(a) For service of a statement of charges under sub. (2) and of actions taken pursuant to s. UWS 17.09, copies shall be served in person or by certified, return-receipt-requested mail to both the student's institution and permanent home address. Where service is by mail, the date of service shall be the second day after the day of mailing.

(b) For informal adjudications pursuant to sub. (3), correspondence and notices may be served in person or by mail to the student's institution address. Where service is by mail, the date of service shall be the second day after the day of mailing.

(7) Penalty enhancement. *Whenever it is established by the hearing tribunal or investigating officer that a student has committed an offense defined in 17.06 against a person because of that person's race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry, or age:*

(a) *the minimum sanction that shall be imposed for such offense is probation;*

(b) if the offense is such that probation, extended probation, suspension or expulsion, or any of these with additional conditions, would normally be imposed, the hearing tribunal in consultation with the investigating officer in the case of formal adjudication, or the investigating officer in the case of informal adjudication shall, for an offense defined in 17.06(1) and (3)-(7) and may, for an offense in 17.06(2), impose a more severe sanction appropriate to the offense.

17.08 STUDENT CONDUCT HEARING TRIBUNAL: STUDENT OPTION. (1) A Student Conduct Hearing Tribunal may be constituted in one of two manners as chosen by the student charged: a hearing examiner alone or a Student Conduct Hearing Committee with a hearing examiner as presiding officer. Upon the filing of charges under sec. 17.07(2) asking for suspension or expulsion, the student shall be informed in writing of his/her right to choose the type of Tribunal. At the time a request for a hearing is made under sec. 17.09(1), the student shall also notify the Chancellor of his/her choice. In the event timely notice is not received from the student, the Chancellor shall decide which choice shall be used for adjudication of the case.

(2) The hearing examiner shall be appointed by the Chancellor upon the filing of charges under sec. I7.07(2) asking suspension or expulsion. The hearing examiner shall be appointed from among qualified personnel of the various state agencies or other qualified residents of the state with experience in conducting hearings. If an examiner is an employee of a state agency other than the University, his/her appointment must be approved by the head of the agency by which he/she is regularly employed and the University shall reimburse such agency for the salary of the examiner and shall pay expenses incidental to his/her duties for the University. The examiner remains the employee of the agency by which he/she is regularly employed. The appointment of the hearing examiner shall be in compliance with secs. 16.24 and 20.901, Wis. Stats. (1971). If the examiner is not an employee of a state agency other than the University, appropriate arrangements for compensation and reimbursement for expenses shall be made by the Chancellor.

(3) A Student Conduct Hearing Committee to hear a particular case shall be composed of the hearing examiner and three (3) members of the faculty and three (3) students selected at random from the faculty and student panels constituted under this section. No person may serve on a committee who is otherwise interested in the case. Upon notification of appointment to serve on a committee, a panel member shall promptly inform the hearing examiner whether he/she agrees to serve; if a panel member is unable to serve, the hearing examiner shall select another at random from the appropriate panel until a full committee is constituted. No member of a committee may participate in deciding a case unless he/she has been present at all hearings held pursuant to due notice; if at least three members of the committee, in addition to the hearing examiner, cannot satisfy this requirement, the case shall be decided solely by the hearing examiner.

(a) *The faculty panel shall consist of ten (10) members of the faculty appointed for one-year* *terms commencing on November 1 of each year. The Chancellor shall make the appointments to the panel after consultation with the divisional committees; vacancies shall be filled in the same manner except that the appointee shall serve for the remainder of the unexpired term. No more than three members of the panel may be from the same division.*

(b) The student panel shall consist of ten (10) currently enrolled students serving one-year terms which commence on November 1 of each year. The appointments shall be made by the president of the Wisconsin Student Association with the advice and consent of the Senate; vacancies shall be filled in the same manner except that the appointee shall serve for the remainder of the unexpired term. No more than three members of the panel may be from the same classification or year.

UWS 17.09 DISCIPLINE INVOLVING SUSPENSION OR EXPULSION. (1) A student charged in accordance with s. UWS 17.07(2) has 10 calendar days from the day of service to request a hearing in accordance with this section. The request for a hearing shall be in writing directed to the chancellor and shall also include an answer to the statement of charges which shall specifically admit, deny, or explain each of the facts alleged in the statement of charges unless the student is without knowledge in which case he/she shall so state, such statement being a denial. If an answer is filed which does not specifically admit, deny, or explain every allegation in the statement of charges, those allegations which are not admitted, denied, or explained shall be deemed denied. An answer which denies some or all of the allegations but which does not request a hearing shall be construed as a request for a hearing.

(2) If the student does not file an answer to the statement of charges in accordance with sub. (1), the allegations in the statement of charges shall be accepted as true and the university may proceed to expel, suspend, or impose other punishment on the student unless good cause to the contrary is shown. The sanction imposed may not exceed that specified in the statement of charges. Notice of such action shall be served on the student and become effective upon service in accordance with s. UWS 17.07(6).

(3) When a request for a hearing is made, the case shall be referred by the chancellor to the student conduct hearing tribunal established in accordance with s. UWS 17.08. Notice of referral to a hearing tribunal shall be sent to the student. The student shall also be notified of the name and address of the person who will present the university's case to the tribunal.

(4)(a) Hearing procedures. In this section, "presiding officer" shall mean the hearing examiner appointed in s. UWS 17.08(1)(a), or the presiding officer of the student conduct hearing committee, established in s. UWS 17.08(1)(b). "Tribunal" shall mean the hearing examiner appointed in s. UWS 17.08(1)(a) or the student conduct hearing committee established in s. UWS 17.08(1)(b).

(b) Duties of the presiding officer. 1. Take custody of the case file and papers.

2. Schedule hearings in accordance with these rules.

3. Issue subpoenas and administer oaths.

4. Rule upon offers of proof and receive relevant evidence.

5. Regulate the course of the hearing, dispose of motions, procedural matters or requests, and, if appropriate or necessary, order the removal of persons who unreasonably obstruct or impair the tribunal's proceedings in its presence, and/or if such persons are students, order the investigating officer to commence disciplinary proceedings.

6. Schedule filing of briefs and proposed findings by the student and the university.

7. Produce a summary of the evidence.

8. Take any other actions necessary to conduct the hearing.

(c) Duties and powers of the tribunal. Individual members of the tribunal:

1. May challenge any ruling by the presiding officer and may, by majority vote overrule such ruling but such matters unless otherwise convenient should be decided in closed session.

2. Shall, by majority vote, render written findings of fact, decision, and disciplinary sanction which does not exceed that specified by the statement of charge.

The tribunal shall establish whether penalty enhancement as defined in 17.07(7) shall pertain.

3. May examine witnesses.

(d) Evidence. Evidence having reasonable probative value shall be admitted, but irrelevant, immaterial and unduly repetitious evidence shall be excluded. The presiding officer and the tribunal are not bound by common law or statutory rules of evidence.

(e) Burden of proof. The burden of proof shall be on the university to establish by a preponderance of the credible evidence that conduct violative of university rules occurred.

(f) Record of the hearings. A record of the testimony and a file of the exhibits shall be made of all hearings conducted in accordance with this section. Either party may, at its own expense, have the record transcribed.

(g) Procedural rights of the students. The students shall have the right to confront and cross-examine witnesses against him/her, the right to present evidence and to be heard on his/her own behalf, the right to be represented by counsel at his/her own expense, and the right to a transcript of the proceedings at his/her own expense.

(h) Public hearings. Hearings to receive evidence or hear argument shall be public unless the student whose case is being heard requests a closed hearing or the tribunal determines in extraordinary circumstances that it is necessary to hold a closed hearing, pursuant to s. 66.77(3)(e), Stats., to avoid unduly damaging the reputation of innocent persons. A record shall be made of the reasons for closing any hearing. The deliberations of the tribunal shall not be public.

(i) Schedule of hearings. The presiding officer shall schedule the hearing as expeditiously as possible. The hearing shall be held on the date scheduled, except for good cause shown.

(j) Failure to proceed. Failure of a party to proceed shall constitute default. The tribunal may either dismiss the charges, or, upon a prima facie showing, find that the student committed the conduct alleged.

(k) Decision. 1. The tribunal's decision shall be rendered in writing within 10 calendar days after the close of the hearing, or within 10 calendar days after a written transcript is available if one of the parties requests a transcript pursuant to par. (g), and shall consist of a summary of the evidence, findings of fact, decision, and specification of the disciplinary sanction which does not exceed that specified in the statement of charges.

2. The tribunal's decision shall be served on the student in accordance with s. UWS 17.07(6) and on the chancellor's office.

3. The tribunal's decision shall become final 10 calendar days after service on the student unless a timely appeal is filed pursuant to s. UWS 17.10 or 17.11.

UWS 17.10 APPEAL TO THE BOARD OF REGENTS. (1) The student or administration may appeal on the record to the committee on student discipline of the board of regents. Said appeal must be filed within 10 calendar days of service upon the party of the decision appealed from and shall consist of written exceptions to the decision's findings of fact, decision, or disciplinary sanction.

(2) Upon receipt of the appeal and written exceptions, the secretary of the board shall transmit the written exceptions to the chairman of the committee and shall cause the person with custody of the decision(s), file, exhibits, and transcript or recording of the hearing(s) to transmit them to the chairman of the committee.

(3) If exceptions are filed under sub. (1), the committee shall afford the parties an opportunity to file briefs and present oral argument.

(4) The committee shall render written findings of fact, decision, and disciplinary sanction which does not exceed that specified by the statement of charges.

(5) The committee's decision shall become final upon service upon the student in accordance with s. UWS 17.07(6).

(6) The board of regents reserves jurisdiction to review, upon its own motion, any disciplinary action against a student.

17.11 INTERMEDIATE APPEALS: CAMPUS OPTION. (1) *With the discretion given to each campus by the Board of Regents, the Chancellor, after consultation with the University Committee and the elected officers of the Wisconsin Student Association, has determined not to provide for intermediate appellate proceedings. Appeals from a decision of the hearing examiner or the Student Conduct Hearing Committee may be made directly to the Board of Regents as provided under sec. 17.10.*

UWS 17.12 TEMPORARY SUSPENSION. (1) A student may be temporarily suspended by the chancellor pending final action on the charges against him/her if his/her continued presence on campus would constitute a potential for serious harm to himself/herself or to the safety of other members of the university community or of university property. Except as otherwise provided in sub. (3), the student shall be afforded an opportunity for a preliminary hearing prior to imposition of the temporary suspension. In order to illustrate the types of conduct which warrant temporary suspension, the following examples are set forth. These examples are not meant to illustrate the only situations or types of conduct intended to be covered.

(a) A student who was arrested and charged with possession of controlled substances with intent to deliver was discovered to have large quantitites of LSD, heroin, methamphetamines, or barbiturates in his/her university dormitory room.

(b) A student who was arrested for throwing a fire bomb into a university classroom building.

(c) A student who assaulted another student in the student union was arrested for engaging in conduct regardless of human life.

(d) A student whose behavior was judged by a psychiatrist to be psychotic, posing a threat to safety of himself/herself or others.

(2) Before a temporary suspension may be imposed, the chancellor shall make an initial evaluation of the reliability of the information received and make such further investigation as circumstances permit. If the chancellor concludes that the conduct alleged warrants temporary suspension of the student, the chancellor shall notify the student of an intention to temporarily suspend the student and, at the earliest practicable opportunity, provide the student with an opportunity to be heard.

(3) The chancellor shall maintain records of all attempts to notify the student in accordance with sub. (2), and, if all reasonable efforts to notify the student are unsuccessful, the chancellor may impose the temporary suspension without a preliminary hearing, provided, however, attempts to notify the student continue, and the student is afforded a preliminary hearing at the earliest practicable opportunity.

(4) (a) The preliminary hearing shall be held as soon as practicable.

(b) At the hearing, the student shall be given a statement of charges as required by s. UWS 17.07(2)(a) and (b) and a summary of the reason(s) for concluding that the alleged conduct warrants temporary suspension.

(c) The issues shall be limited to consideration of the reliability of the evidence against the student and whether the alleged conduct warrants temporary suspension.

(d) The chancellor's decision may be rendered orally but shall be confirmed in writing, as soon as practicable. The decision must be supported by credible evidence which is sufficient to indicate that there is probable cause to believe that the student engaged in the alleged conduct and that such conduct warrants temporary suspension.

(5) The hearing on the charges as required by s. UWS 17.09 shall be commenced not later than 15 calendar days after the imposition of the temporary suspension unless the student requests a delay of the hearing and continuation of the temporary suspension until a later date.

UWS 17.14 NOTICE TO STUDENTS. Each institution shall publish and make freely available to students, a copy of the foregoing UW system disciplinary code together with an appendix reprinting the UW system administrative code, any amendments to these 2 codes that are made after the board of regents adoption of a disciplinary code, and any provisions that have been adopted by the particular campus pursuant to the campus options allowed by this disciplinary code, and any other supplementary provisions not inconsistent with this code.

PART III: CONDUCT ON UNIVERSITY LANDS, CHAPTER UWS 18

Section 17.06(6) of the University of Wisconsin System Disciplinary Procedures set forth above refers to the rules in Chapter UWS 18, Wisconsin Administrative Code, the violation of which may subject a student to discipline, including suspension or expulsion. These rules have specific penalties such as fines up to $500, or imprisonment for up to 90 days. These penalties are imposed by the courts of Dane County. However, violation of these rules may also subject the student to University discipline including suspension or expulsion as indicated by Section 17.06(9) above. Sections .06 through .10 of Chapter UWS 18 of the Administrative Code follow below.

UWS 18.06 CONDUCT ON UNIVERSITY LANDS. (1) No person may dump any waste, trash, debris, rubbish, earth or other fill, on any university lands unless authorized by the chief administrative officer.

(2) No person may remove any shrubs, vegetation, wood, timber, rocks, stone, earth, signs, fences, or other materials from university lands, unless authorized by the chief administrative officer.

(3) No person may remove, destroy, or molest any bird, animal or fish life within the boundaries of university lands except as authorized by the chief administrative officer or except when this provision conflicts with a special order of the department of natural resources.

(4) No person may break, tear up, mar, destroy or deface any notice, tree, vine, shrub, flower or other vegetation, or dislocate any stones, or disfigure natural conditions, or deface, alter, destroy or damage in any way any other property, real or personal, within the boundaries of any university lands unless authorized by the chief administrative officer.

(5) The presence of dogs, cats, and other pets is prohibited in all university buildings and in arboretums at all times except as authorized by the chief administrative officer. Seeing-eye dogs wearing harnesses and under the control of their owners shall be exempt from these provisions. The presence of dogs, cats and other pets shall be prohibited on all other university lands unless they are on leash under the control of and accompanied by a person. Any dog, cat or other pet found in violation of this subsection may be impounded and its owner subject to the penalty provisions in section UWS 18.07.

(6) The chief administrative officer may, by posting appropriate signs, limit or prohibit entrance to university lands, or portions thereof, in order to maintain or preserve an instruction or research area.

(7) Closing hours. (a) Except as specifically provided in this code, the chief administrative officer may establish closing hours and closed periods for university lands, buildings, or portions thereof. These closing hours and closed periods shall be posted in at least one conspicuous place adjacent to or at the periphery of the area to be closed, or, in the case of buildings, on the building.

(b) No person, unless authorized to be present during closed periods, may enter or remain within the designated university lands, buildings, or portions thereof during a closed period established under this section.

(c) For the purpose of subsection (b), "person authorized to be present" means a person authorized to be present by an order issued pursuant to subsection (a) or Section 36.35(2), *Wis. Stats.*, 1973.

(d) No person, except those authorized to be present after the posted closing hour, may enter or remain in any university arboretum or picnic area unless traversing those areas or on park roads at the times the roads are open to the public.

(8) Bicycles. No person may park or store his/her bicycles in buildings, on sidewalks or driveways, or in motor vehicle parking spaces, except in areas designated for that purpose or in bicycle racks. Bicycles shall be parked so as not to obstruct free passage of vehicles and pedestrians.

(9) Climbing; walking on roof. No person may climb into, out of or on university buildings or maintenance facilities or walk upon the roof of a university building; except when emergency access to a fire escape is necessary, or for required maintenance, or when authorized by the chief administrative officer.

(10) Firearms. No person may carry, possess or use firearms on university lands except as required (a) for educational programs for which the use of firearms has been approved by the chief administrative officer; or, (b) for use in rifle or pistol ranges established and supervised by the university with the approval of the chief administrative officer; or (c) for law enforcement purposes. Firearms in violation of this regulation may be confiscated and removed from university lands by police, and disposed of as authorized by law.

(11) Fires. No person may light, build, or use any fires except in such places as are established for this purpose and designated by the chief administrative officer. No person may throw away any cigarette, cigar, pipe ash, or other burning materials without first extinguishing it.

(12) Keys. (a) No person may duplicate a university key or request the unauthorized duplication of a university key.

(b) No person may transfer any university key from an individual entrusted with its possession to an unauthorized person, or be in unauthorized possession of a university key.

(c) Keys in the possession of unauthorized persons may be confiscated.

(13) Alcohol beverages. (a)The use or possession of alcohol beverages (fermented malt beverages and intoxication liquors containing 0.5% or more of alcohol by volume) is prohibited on all University premises, except in faculty and staff housing, and, as permitted by the chief administrative officer, subject to statutory age restrictions. The chief administrative officer may generally permit the use or possession of alcohol beverages by promulgating institutional regulations as provided under sec. UWS 18.09, or in specific instances by written permission.

(b)No person may procure, sell, dispense or give away alcohol beverages to any other person contrary to the provisions of ch. 125, Stats.

(14) Picnicking and camping. No person may picnic or camp on university lands, except in those areas specifically designated as picnic or camping grounds. No person may violate any rules or regulations for picnicking or camping established and posted by the chief administrative officer. For purposes of this regulation, camping shall include the pitching of tents or the overnight use of campers or camp trailers.

(15) Structures. No person may place or erect any facility or structure upon university lands unless authorized by the chief administrative officer.

(16) Selling, peddling and soliciting. (a) No person may sell, peddle or solicit for the sale of goods, services, or contributions on any university lands except:

(1) When the occupant of a specific university office, or university house, apartment, or dormitory room has given specific permission in advance for a person engaged in that activity to come to that particular office, house, apartment, or dormitory room for that purpose.

(2) Sales by an individual of personal property owned or acquired by the seller primarily for his/her own use pursuant to an allocation of space for the purpose by an authorized university official.

(3) Hawking newspapers and similar printed matter outside university buildings.

(4) Subscription, membership, ticket sales solicitation, fund-raising, selling, and soliciting activities by or under the sponsorship of a university or registered student organization pursuant to a contract with the university for the allocation or rental of space for that purpose.

(5) Admission events in a university building pursuant to contract with the university, and food, beverage or other concessions conducted pursuant to a contract with the university.

(6) Solicitation of political contributions under Chapter 11, *Wis. Stats.* and institutional regulations governing time, place and manner.

(17) Signs. No person may erect, post or attach any signs, posters, pictures or any item of a similar nature in or on any building or upon other university lands except on regularly established bulletin boards, or as authorized by the provisions of this code or by the chief administrative officer.

(18) Smoking. No person may smoke in any university building except in those areas designated for that purpose.

(19) Recreational activities. (a) No person may swim, fish, boat, snowmobile, ride horseback or use any type of all-terrain or off-road vehicle on university lands except in those areas and at times expressly designated by the chief administrative officer and denoted by official signs.

(b) No person may dock, moor, park, or store any boats, boating gear, snowmobiles, or similar equipment on university lands except under conditions specified by the chief administrative offices.

(20) Restricted use of unions. No person, except members of the union, university faculty and staff, invited guests, and university-sponsored conference groups, may use union buildings and union grounds except on occasion when, and in those areas where, the buildings or grounds are open to the general public.

(21) Unauthorized presence, (a) No person may be present in any class, lecture, laboratory period, orientation session, examination, or other instructional session or in any room, office, or laboratory without the consent of an authorized university official or faculty member.

(b) A person shall be deemed present without consent in any class, lecture, laboratory period, orientation session, examination, or other instructional session as prohibited by paragraph (a) if: (1) such person is not then enrolled and in good standing as a member of the instructional session, or (2) such person refuses to provide identification and refuses to leave such session upon request of a member of the university administration or faculty or other person in charge thereof.

(22) Persons prohibited from entering campus. (a) No person, who is in a state of suspension or expulsion from the university under Chapter UWS 17, or who takes leave or resigns under charges after being charged by the university under Chapter UWS 17, may enter any campus without the written consent of the chief administrative officer.

(b) No person who is convicted of any crime involving damage to property or persons as a result of conduct by him/her on university lands may enter any university lands within one year of the effective date of his/her convictions without the written consent of the chief administrative officer.

(c) Factors to be considered. In granting or denying consent to enter a campus under section 36.35(3), *Wis. Stats.*, or subsections (a) or (b) of this section, the following factors shall be considered:

1. The probability that the offensive conduct will be continued or repeated by the applicant.

2. The need for the applicant to enter university lands, for example, to attend a university disciplinary hearing in which the applicant is being tried or is to be a witness, or to receive treatment in university hospitals.

(d) For the purposes of section 36.35(3), *Wis. Stats*, 1973, and subsection (b) of this section, "crime involving danger to property or persons" shall mean any crime defined in *Wis. Stats.*, 1973, chapter 940 (crimes against life and bodily security), section 941.13 (False alarms, and interference with fire fighting), section 941.20 (Reckless use of weapons), section 941.22 (Possession of pistol by minor), section 941.23 (Carrying concealed weapon), section 941.24 (Possession of switchblade knife), section 941.30 (Endangering safety by conduct regardless of life), section 941.31 (Possession of explosives for unlawful purpose), section 941.32 (Administering dangerous or stupefying drug), section 943.01 (Criminal damage to property), section 943.02 (Arson of buildings; damage of property by explosives), section 943.03 (Arson of property other than buildings), section 943.05 (Placing combustible materials, an attempt), section 943.06 (Molotov cocktails), section 943.10 (Bomb scares), section 167.10 (Fireworks regulated), or attempts to commit any of the above crimes as defined in section 939.32, *Wis. Stats.*, 1973.

(23) Picketing, rallies, parades, demonstrations and other assemblies.

(a) In order to preserve the order which is necessary for the enjoyment of freedom by members of the university community, and in order to prevent activities which physically obstruct access to university lands or buildings and prevent the university from carrying on its instructional, research, public service, or administrative functions, any picketing, rally, parade, demonstration, other assembly, or congregation of spectators to such activity may be declared unlawful if its participants:

1. Intentionally gather or intentionally remain assembled outside any university building in such numbers, in such proximity to each other or in such fashion as to physically hinder entrance to, exit from, or normal use of the building.

2. Intentionally congregate or assemble within any university building in such fashion as to obstruct or seriously impair university sponsored or university-authorized activities, or in such fashion as to violate any of the following conditions:

a. No group may be admitted into the private office of any faculty member or other university employee unless invited by the authorized occupant of that office, and then not in excess of the number designated or invited by that person.

b. No group may obstruct or seriously impair passage through corridors, stairways, doorways, building entrances, fire exits, and reception areas leading to offices.

c. No group, not authorized to do so by the person in immediate charge of the room, or by a person designated by the chief administrative officer to approve requests for the use of rooms for meetings, may enter or occupy any university buildings or part thereof.

d. No group may assemble immediately outside rooms at times when they are normally in use for classes, study, or research.

e. No signs supported by standards or sticks shall be permitted in any assembly in a university building.

3. Intentionally create a volume of noise that unreasonably interferes with university sponsored or university-authorized activities.

4.(a) Intentionally employ force or violence, or intentionally constitute an immediate threat of force or violence, against members of the university community or university property.

(b) For the purpose of subsection (a) of this section, "intentionally" means that the participant or spectator knew or reasonably should have known that his/her conduct by itself or in conjunction with the conduct of others would have the prohibited effect.

(c) The chief administrative officer may designate a university official or officials who shall have primary authority to implement subsection (a) of this section. He/She may prescribe limitations for any picketing, rally, parade, demonstration or other assembly which may not comply with subsection (a), the chief administrative officer or the designee may proceed immediately to the site and determine if there is compliance with subsection (a). If he/she finds a violation of subsection (a), he/she may declare the assembly unlawful or he/she may prescribe those limitations on numbers, location or spacing of participants in the demonstration which are reasonably necessary to ensure compliance with subsection (a). If he/she prescribes limitations, and if his/her limitations are not observed by the assembly, he/she may then declare the assembly unlawful. Any declaration of illegality or prescription of limitations shall be effective and binding upon the participants in the assembly unless and until modified or reversed.

(d) Any participant or spectator within the group constituting an unlawful assembly who intentionally fails or refuses to withdraw from the assembly after it has been declared unlawful under this section shall be subject to immediate arrest and liable to the penalties of section UWS 18.07.

(24) Prohibitions on blocking entrances. No person may intentionally physically block or restrict entrance to or exit from any university building or portion thereof with intent to deny to others their right of ingress to, egress from, or use of the building.

(25) Sound-amplifying equipment. (a) In order to permit the use of sound-amplifying equipment on university lands, if needed for the dissemination of ideas to large audiences, but to prevent its use from interfering with university functions which inherently require quiet, the following provisions shall apply:

1. No person may use sound-amplifying equipment on any lands without the permission of the chief administrative officer, except as provided in subsection (c) of this section.

2. In granting or denying permission, the following principles shall govern:

a. Except in extraordinary circumstances, permission may be granted to use the equipment only during the following hours, 12noon to 1:30p.m and 5:00p.m. to 7:00p.m. every day, and only when the equipment is more than 50 feet from and directed away from any classroom building, residence halls, library or building being used as a study hall.

b. An applicant for permission shall have the burden of establishing the need for amplification to communicate with the anticipated audience. In particular, the applicant must show that the audience can reasonably be expected to include at least 250 people.

c. An applicant for permission shall have the burden of establishing that the volume and direction of the sound from the equipment will minimize interference with other activities.

3. Any request for the permission required by the section must be submitted in writing to the chief administrative officer at least 24 hours prior to the intended use of the sound-amplifying equipment, and must be signed by a student or employee of the institution where the equipment is to be used. The request shall contain:

a. The proposed hours, date and location where the equipment is to be used.

b. The size of the anticipated audience and the reasons why the equipment is needed.

c. A description of the proposed equipment which includes the manufacturer, model number, and wattage.

d. The names of the owner of the equipment and of any person or persons, in addition to the person signing the application, who will be responsible for seeing that the equipment is operated in compliance with the terms of the permit and the provisions of this rule. The chief administrative officer may require the presence of additional persons if said officer believes this is necessary to ensure compliance.

(b) Permits issued by the chief administrative officer shall not be required for the use of university sound-amplifying equipment used with the permission of the university employee having control of the equipment for authorized university classes, research, or meetings in university buildings, or for university sponsored academic, recreational or athletic activities, or for crowd control by authorized university officials.

(c) For the purpose of this section, "sound-amplifying equipment" means any device or machine which is capable of amplifying sound and capable of delivering an electrical input of one or more watts to the loudspeaker.

(26) Containers in spectator facilities. No person may carry or possess any disposable container within the confines of public areas in spectator facilities. As used in this subsection, "disposable container" means any bottle, can, or other container designed or used for carrying liquids or solids, but does not include a personally owned container designed for reuse and originally sold or purchased exclusively as a refillable container. The provisions of this section shall not apply to containers used or supplied by authorized concessionaires who are required to dispense beverages to consumers in either paper or plastic containers.

(27) No person may throw or drop any hard object, bottle, can, container or other item of a similar nature within or from within the confines of a spectator facility.

(28) Ticket scalping. (a) Every ticket or other evidence of the right of entry to any amusement, game, contest, exhibition, or performance given by or under the auspices of the University of Wisconsin shall be considered a revocable license to the person to whom the ticket has been issued and shall be transferable only on the terms and conditions prescribed.

(b) No person may buy or sell a ticket or other evidence of the right of entry for more than the price printed upon the face of the ticket.

UWS 18.07 PENALTIES. Unless otherwise specified, the penalty for violating any of the rules in section 18.06 shall be a fine of not more than $500, or imprisonment of not more than 90 days, or both, as provided in section 36.11 (1)(a), *Wis. Stats.*, 1973.

UWS 18.08 SEVERABILITY. If any provision of this chapter is invalid, or if the application thereof to any person or circumstances thereof is invalid, such invalidity shall not affect other provisions or application.

UWS 18.09 INSTITUTIONAL REGULATIONS. Institutional regulations promulgated under sections 18.04–18.06 shall take effect when filed with the secretary of the board.

UWS 18.10 ADDITIONAL STATUTORY PROVISIONS REGULATING CONDUCT ON UNIVERSITY LANDS. (1) Controlled substances. The use or possession of controlled substances as defined in chapter 161 *Wis. Stats.*, 1973, is prohibited on all university property with the specific exemptions set forth in chapter 161 *Wis. Stats.*, 1973. The penalty provisions of chapter 161 *Wis. Stats.*, 1973, and chapter UWS 17 shall apply to violations occur ring on university lands.

(2) Persons prohibited from entering campuses. Student convicted of dangerous and obstructive crime. Section 36.35(3), *Wis. Stats.*, 1973, provides: "Any person who is convicted of any crime involving danger to property or persons as a result of conduct by him/her which obstructs or seriously impairs activities run or authorized by an institution and who, as a result of such conduct, is in a state of suspension or expulsion from the institution, and who enters the property of that institution without the permission of the chancellor of the institution or the chancellor's designee within 2 years, may for each such offense be fined not more than $500 or imprisoned not more than 6 months, or both."

PART IV. UNIVERSITY POLICIES ON USE OF FACILITIES AND OUTSIDE SPEAKERS

University Policy on Student Freedom

Free inquiry and expression are essential in a community of scholars. As members of such a community, students should be encouraged to develop a capacity for critical judgment and sustained and independent search for truth. Freedom to learn depends upon appropriate opportunities and conditions in the classroom, on the campus, and in the larger community.

Scope of Student Freedom

Students have the right accorded to all persons by the Constitution, to freedom of speech, peaceable assembly, petition and association. Students and student organizations may examine and discuss all questions of interest to them, and express opinions publicly as well as privately. They may support causes by lawful means which do not disrupt the operations of the university or of organizations accorded the use of University facilities.

Policy of The Board of Regents on Student Freedom

The policy of the Board of Regents is effected in the following statements:

(1) The action of the Board of Regents in 1894, "Whatever may be the limitations which trammel inquiry elsewhere, we believe that the Great State University of Wisconsin should ever encourage that continual and fearless sifting and winnowing by which alone the truth can be found," shall be applicable to teaching in the classroom and to the use of University halls for public addresses, under the control of the president of the University with appeal to the Regents.' (May 2, 1922)

(2) True to its time-honored traditions, the University of Wisconsin provides a forum for the free exchange of ideas and viewpoints upon current events and issues.' (Statement of President E. B. Fred, Approved by the Regents, March 8, 1952)

(3) The search for truth is the central duty of the University, but truth will not be found if the scholar is not free, it will not be understood if the student is not free, it will not be used if the citizen is not free. At a time when both truth and freedom are under attack the University of Wisconsin must seek the one and defend the other. It must employ with utmost energy the power of truth and freedom for the benefit of mankind.' (December 8, 1956)

(4) We must continue to guard the University's time-honored freedom of experimentation and expression — that fearless, democratic process which is the essence of the ceaseless search for truth. We believe that the only indoctrination worthy of this institution is in the values of freedom and free inquiry. For this we need exposure to a variety of viewpoints, brought together in the University's own example of freedom's effective power. This is basic in our form of government and, we believe, its surest safeguard.' (March 10, 1961)

(5) The concept of intellectual freedom is based upon confidence in man's capacity for growth in comprehending the universe and on faith in unshackled intelligence. The University is not partisan to any party or ideology, but it is devoted to the discovery of truth and to under-

standing the world in which we live. The Regents take this opportunity to rededicate themselves to maintaining in this University those conditions which are indispensable for the flowering of the human mind.' (January 10, 1964)

Policies Governing the Use of University of Wisconsin–Madison Facilities

The University of Wisconsin–Madison is large and diverse. Its facilities include approximately 200 buildings on 900 acres of the main campus. Because of its size, the comprehensiveness of its activities, and the fact that the University is a public institution, there is considerable demand for use of its facilities by University and non-University groups.

ACCESS

It has been a long-standing practice and is current UW System Regent policy that "the facilities of the university are to be used primarily for purposes of fulfilling the university's missions of teaching, research and public service. University facilities are not available for unrestricted use for other purposes." (UWS 21.01)

Student organizations duly registered with the Dean of Students Office may use University facilities. Faculty and staff normally have access to University facilities through their academic department or administrative unit. Governmental and public educational agencies may use University facilities when available.

Any use of facilities by University or non-University groups must be contingent upon sponsorship by an appropriate academic division, department, or administrative or governmental unit.

RESERVATIONS

Use of University facilities is arranged through contacting the apporpirate office.

Requests for instructional space are made through the Instructional Space Office which is a part of the Space Management Office. Requests for all other space are handled by the Central Reservations Office, an arm of the Space Management Office operated under the auspices of the Memorial Union and Union South.

Some units maintain scheduling procedures for specialized facilities under their immediate control. These include: the Division of Intercollegiate Athletics, College of Agricultural and Life Sciences (Stock Pavilion), Recreational Sports, University Housing, University Theatre, and the School of Music. These units have policies which apply to the specific requirements of the space under their control.

FEES

No rental fee is charged for the use of University facilities when there is no admission charged, donation requested, or revenue generated. Other fees are imposed when there are security expenses, or when a special setup is required, special equipment is needed, or when it is anticipated that there will be more than routine cleanup required following a particular event.

The establishment of rental or other fees for the use of University facilities will be based on the following considerations:

1) recovery of direct costs and any overhead involved in maintaining the facility;

2) consideration of competition with the local market offering similar facilities; and

3) the possibility that income may be subject to an Unrelated Business Income Tax.

REVENUE PRODUCING ACTIVITIES

Any revenue-producing activity held in a University facility by a student organization or other non-departmental or non-governmental group must be guided by the following principles:

1) Use of the facility shall be authorized by a written contract between the University and the sponsoring organization.

2) Revenue produced by the event shall be deposited in a University account and shall not be released until all University costs associated with the event are paid.

3) Invitations to attend revenue-producing events sponsored by student organizations shall be limited to students, faculty, and staff unless an exception is specifically authorized by the Chancellor or Chancellor's designee.

OTHER PROVISIONS GOVERNING USE OF UNIVERSITY FACILITIES

Use of University facilities may be associated with events that include the consumption of alcohol. The University has developed specific guidelines governing the possession and consumption of alcoholic beverages. These guidelines set conditions which affect the use of University facilities. The University's advertising and public use policy also contains certain requirements which apply to facilities use, particularly those dealing with the display of materials that have a strong product identification.

Freedom from Obstruction

"Those who attend a speech or program sponsored by student organizations, University departments, or other authorized groups, have the duty not to obstruct it, and the University has the obligation to protect the right to listen or participate."

(Approved by the University Faculty Assembly on February 3, 1968. UFA Document 10, and by the Regents on March 15, 1968.)

The following policies on use of University facilities were adopted by the Board of Regents of the university system, December 6, 1974: Resolution 911, and December 17, 1976: Resolution 1360.

1. Use of University Facilities by Non-University Groups. Facilities of the University are primarily for University purposes of instruction, research and public service; they are not available for unrestricted use by non-University groups. If, in the judgement of a University department or organization, the meetings or activities of a non-University group will contribute to and serve the University's purposes, University facilities, when available, and subject to necessary routine procedures administered by the chancellor or his designee, may be used by that group, but only upon the invitation of or under the sponsorship of a University department or organization.

2. Use of University Facilities by Governmental and Public Educational Groups. University facilities may be used by governmental and public educational agencies when they are available, subject to necessary routine procedures administered by the chancellor or his designee.

3. Use of University Facilities by Political Parties or Candidates for Public Office. Leaders of political parties and candidates for public office may hold public meetings on each campus, if facilities are available, and subject to necessary routine procedures administered by the chancellor or his designee. During any election campaign a University auditorium may be made available for one public meeting on behalf of each recognized candidate for public office. In a general election year, each political party may use a University auditorium for one public meeting on behalf of each recognized candidate for public office. In a general election year, each political party may use a University auditorium for one public meeting on behalf of its candidates for statewide office. State conventions of recognized political parties may also use University facilities. Members of the audience should be given a reasonable opportunity, in appropriate situations, to ask questions at the end of the presentation.

4. Use of University Facilities for Political Solicitations. The use of state facilities for the purpose of making or receiving political contributions is strictly prohibited by state law.

5. Any contract drawn between the University and a non-University group under the above policies shall:

a. Provide for recovery of costs for such usage to insure that the State will not be required to spend any public funds to accommodate those renting the premises during the period authorized.

b. Note that authorized use of facilities does not in any way constitute University or State endorsement of the using organization, its views or objectives, nor program content.

c. Be limited to uses that do not interfere with primary University uses for which the facilities were intended.

6. Use of University Facilities for Programs Which May Include Religious Topics.

Chancellors or their designees may authorize registered student groups, official campus commit tees and outside groups under terms of this policy to sponsor programs which include religious topics in University facilities, and use of such facilities may be granted for the purpose of conducting religious worship services, which must be primarily for University students, faculty and staff; provided, such services shall not be conducted on a regular or continuous basis. This policy does not apply at University Hospitals.

PART V. NONRESIDENT TUITION

At the time application for admission or reentry into the University of Wisconsin–Madison is made, residence for tuition purposes is determined based on the information submitted. The decision rests on that section of the Wisconsin Statutes dealing with the subject. Questions concerning determination of legal residence should be directed to the Residence Counselor located in the Peterson Office Building.

PART VI. RELEASE OF STUDENT RECORDS

Introduction

The Family Educational Rights and Privacy Act of 1974, as amended, requires that you be advised of your rights concerning your education records and of certain categories of public information which the University has designated "directory information." This notice in question and answer format satisfied the requirements of the Act. The UW–Madison policy on student records was adopted by the Committee on Access to Student Records on December 14, 1976, and approved by the Chancellor.

1. As a student on the Madison campus, what rights do I have regarding my University records?

You have the right to inspect and review all your records which meet the Act's definition of "education records."

2. What is the definition of "education records?"

Education records are all the records maintained by the University about you. There are seven exceptions:

a. personal notes of University of Wisconsin staff and faculty,

b. employment records,

c. medical and counseling records used solely for treatment,

d. records in the Department of Protection and Security,

e. financial records of your parents,

f. confidential letters and statements of recommendation placed in your records prior to January 1, 1975.

g. confidential letters and statements of recommendation for admission, employment or honorary recognition placed in your records after January 1, 1975, for which you have waived the right to inspect and review.

3. Is there any situation in which the University may insist that I waive my rights?

Under no condition may you be required to waive your rights under this Act before receiving University services or benefits.

4. Where are my records kept?

Records are not maintained in a central location on the campus. Requests to review your records must be made separately to each office which maintains your records. Your request must be made in writing and presented to the appropriate office. That office will have up to 45 days to honor your request. For most students, these offices will include the Registrar, your school or college dean's office, your major departments and any other campus offices with which you have been in contact, such as Student Financial Aids, Dean of Students, or Residence Halls.

5. What if I do not agree with what is in my records?

You may challenge any information contained in your "education records" which you believe to be inaccurate, misleading, or inappropriate. This right does not extend to reviewing grades unless the grade assigned by your professor was inaccurately recorded in your records. You may also insert a statement in your record to explain any such material from your point of view. If you wish to challenge information in your file, you must make a written request for a hearing to the dean or director of the appropriate office. In most cases, the decision of the dean or director will be final. However, you may elect to file an appeal in writing to the Chancellor who will review the decision only if a significant question of policy or compliance with the law appears to be raised by the case.

6. May I determine which third parties can view my education records?

Under the Act, your prior written consent must be obtained before information may be disclosed to third parties unless they are exempted from this provision. Information will be released without your prior written consent only in the following instances:

a. requests from University of Wisconsin–Madison faculty and staff with a legitimate educational "need to know" (except employees of the Department of Police and Security),

b. requests in accordance with a lawful subpoena or court order,

c. requests from representatives of agencies or organizations from which you have received financial aid, including banks or other lending agencies from which you have received guaranteed student loans,

d. requests from officials of other educational institutions in which you intend to enroll,

e. requests from other persons specifically exempted from the prior consent requirement by the Act (certain federal and state officials, organizations conducting studies on behalf of the University and accrediting organizations),

f. requests for "directory information" (please refer to the next question for an explanation),

g. requests in connection with an emergency if the knowledge of such information is necessary to protect the health or safety of the student or other person.

7. What is meant by the term "directory information?"

The University, in accordance with the Act, has designated the following categories of information about you as public unless you choose to exercise your right to have any or all of this information withheld. This information will be routinely released to any inquirer unless you request that all or part of this list be withheld. These categories are:

name,

address (school and permanent),

telephone listing,

date of birth,

major field of study (including current classification, year, credit load, and number of academic credits earned toward degree),

dates of attendance (matriculation and withdrawal dates),

degrees and awards received (type of degree and date granted),

most recent previous educational institution attended, and

participation in officially recognized activities and sports and weight and height of members of athletic teams.

8. What kinds of inquiries does the University receive for "directory information?"

The University receives many inquired for "directory information" from a variety of sources including friends, parents, relatives, prospective employers, graduate schools, honor societies, licensing agencies, government agencies and news media. Please consider very carefully the consequences of any decision by you to remove these items from the list of "directory information." Should you decide to inform the University not to release any or all of this "directory information," any future requests for such information from non-University persons or organizations will be refused. For example, the University could not release your telephone number, or address to a family member wishing to notify you of a serious illness or crisis in the family. A prospective employer requesting confirmation of your major field of study, address or date of birth would also be denied access to such items should you withdraw them from the list of "directory information." The University will honor your request to withhold any of the then items listed above but cannot assume responsibility to contact you for subsequent permission to release them. Regardless of the effect upon you, the University assumes no liability for honoring your instructions that such information be withheld.

If you wish to file a form withdrawing some or all of the information in the "directory" classification, you should report to the Registrar's Office, Room 151, Peterson Office Building, and complete the necessary form. After you have filed this form, the Registrar will notify the appropriate University offices and begin to comply with your wishes as soon as possible.

9. Where can I find out more information about the provisions of the Act?

If you have any questions regarding the provisions of the Act, you may contact either the Campus Assistance Center, 420 N. Lake St., telephone 263–2400, or the Registrar's Office, 151 Peterson Office Building, telephone 262–3811.

10. Whom should I contact if I wish to make a complaint?

If you believe that the University is not complying with the Act, please direct your comments to the Committee on Access to Student Records, Donald J. Wermers, Chairperson, 130 Peterson Office Building, telephone 262–3964.

A student has the right to file complaints alleging University non-compliance with the Act with the federal agency which enforces the act. The address is the Family Educational Rights and Privacy Act Office, Department of Education, 400 Maryland Ave. S.W., Washington, D.C. 20201.

PART VII. THE ACADEMIC CALENDAR AND RELIGIOUS OBSERVANCES

No Mandatory Requirements on Major Observances

The faculty should be encouraged not to schedule mandatory academic exercises, or require class attendance, on the first day of Passover and Passover Eve, Rosh Hashanahg, Yom Kippur, Good Friday, Christmas, Christmas Eve, and Easter.

Conflicts Between Academic Requirements and Religious Observances

A student with a conflict between an academic requirement and a religious observance must be given an alternate means of meeting the academic requirement.

(a) In order to be granted an alternate means of meeting an academic requirement, students must notify their instructors, within the first two weeks of class, of the specific days on which they will request relief from an academic requirement.

(b) Instructors are not obliged to schedule make-ups before the regularly scheduled requirements.

(c) It is understood that instructors may set reasonable limits on the total number of days claimed by any one student.

Effective Notification of Faculty and Students

Students need to claim relief from academic requirements during the first two weeks of class.

Part VIII: UW–Madison Student Photo ID Service Cards

The University of Wisconsin–Madison requires all registered students to obtain a student photo ID service card; it is official identification for students at the University of Wisconsin–Madison and is necessary for access to libraries, recreation facilities, and other services. For ID service card validation, fees must be paid.

All photo ID service cards are the property of the University of Wisconsin–Madison and must be returned upon request. Only the most recently issued ID card is valid; previously issued ID service cards will be confiscated. A student may have only one photo ID service card in his or her possession.

A replacement card can be obtained free of charge if there is a name change, the picture needs updating, or the card is damaged. The old card must be returned at the time the replacement card is requested. If a new card is needed because a card has been confiscated, lost, stolen, or misplaced; or the old card cannot be returned, a nonrefundable fee must be paid. This fee is subject to change without notice.

"FRAUDULENT USE OR FRAUDULENT REPRODUCTION OF A UW–MADISON ID SERVICE CARD OR VALIDATION STICKER IS A VIOLATION OF WISCONSIN CRIMINAL STATUTES. VIOLATORS WILL BE REFERRED TO THE AUTHORITIES FOR PROSECUTION." Section 943.38 FORGERY (3) of Wisconsin Statutes provides: "Whoever, with intent to defraud, does any of the following is guilty of a Class A misdemeanor: . . . . (b) Falsely makes or alters any writing of a kind commonly relied upon for the purpose of identification. . . . " The penalty for a Class A misdemeanor is a fine of not to exceed $10,000 or imprisonment not to exceed 9 months, or both.

Further information is available from the Photo ID Office, 54A Peterson Office Building, 262-3258.

A library of audio messages, accessible by phone 24 hours a day, providing a quick and easy source of background information of interest and assistance to the UW–Madison community.

To Use Dial:

1. Select the message you wish to hear by its four digit number.
2. Call DIAL at 263-3100.
3. Follow the audio instructions.

[Hearing impaired persons, please inquire regarding alternate access.]

ACADEMICS

Adult Education

3110 University Special Students
3111 Adult Career & Educational Counseling Center
3121 Guest Students

Agricultural and Life Sciences

3580 Majors & Degree Programs in the College of Agricultural & Life Sciences
3581 Preparation for Veterinary and/or Medical School

Education

3174 Occupational Therapy Program
3175 Physical Therapy Program
3517 Employment Outlook for Teachers

Family Resources and Consumer Sciences

3575 Careers in Apparel, Interior & Textile Design, Textile Science & Retailing

Graduate School

3112 Typing Instructions for Ph.D. Theses

Institute for Environmental Studies (IES)

3500 IES Instructional and Research Programs
3501 Undergraduate Certificate in Environmental Studies

Medical School

3456 The Physician Assistant Program
3458 Undergraduate Programs in the Medical School
3581 Preparation for Veterinary and/or Medical School

Programs and Standards

3109 1993 Summer Sessions
3110 University Special Students
3118 Academic Dishonesty Code
3119 Small Business Development Center
3120 Precollege Programs
3121 Guest Students
3128 McBurney Disability Resource Center
3129 College Students with Learning Disabilities
3130 Services for Learning Disabled Students
3140 Center for New Student Development
3141 Wisconsin Welcome Week
3200 The Honors Program
3201 Study Abroad Through UW–Madison
3381 Academic Advancement Program
3382 Programa de Adelanto Academico
3836 Certificate Programs at UW–Madison

Veterinary Medicine

3550 School of Veterinary Medicine
3581 Preparation for Veterinary and/or Medical School

REGISTRATION AND RECORDS

Fees

3800 Assessment of Fees
3801 Late Fees
3802 Fee Refunds
3803 Remission of Nonresident Fees
3804 Nonresident Tuition Appeals
3805 Wisconsin–Minnesota Reciprocity Agreement
3806 Tuition: Residence–Nonresidence
3807 Tuition: Moving to Wisconsin
3808 Tuition: Moving Out of Wisconsin

Financial Aid

3600 Veterans' Benefits
3634 Applying for Financial Aid
3635 How Financial Need is Determined
3636 Financial Aid for Graduate and Law Students
3637 Aid for Self-Supporting Students
3638 Pell Grant
3639 Undergraduate Scholarships
3640 Work-Study Employment
3641 Where Can I Find a Part-Time Job?
3643 GSL/Stafford Loan
3644 Short-Term Loans
3645 Repaying Education Loans

Cornell University

Campus Code of Conduct

TITLE FOUR JUDICIAL STRUCTURE AND PROCEDURE

I. *THE UNIVERSITY HEARING BOARD*

The University Hearing Board shall consist of twenty-eight members elected by the University Assembly: eight students, twelve faculty members nominated by the Dean of the University Faculty, and eight other employees. The Committee on Committees of the University Assembly, in consultation with the Codes and Judicial Committee, shall solicit applications and shall nominate candidates to the University Assembly.

A. Written applications shall be solicited from the Cornell community by the Committee on Committees and the Codes and Judicial Committee.

B. Board members shall be nominated by the Committee on Committees, in consultation with the Codes and Judicial Committee, for approval by the University Assembly no later than the last regular meeting of the outgoing University Assembly.

C. Individual nominees shall be named to replace individual board members.

D. All nominations are subject to University Assembly confirmation.

E. No person shall serve on the University Hearing Board who is at the same time a member of the University Assembly, or its Codes and Judicial Committee or Committee on Committees, an employee of the Assemblies, or a member of the University Review Board, except for the temporary appointment provision as defined in Title Four V B 1 c.

F. Members of the University Hearing Board shall serve terms of office as follows:

1. Eight students, twelve faculty members and eight employees shall be appointed for two-year staggered terms.
2. Terms of office shall begin with the first day of classes in the next academic year.

G. If any board member vacates his or her position, by resignation or departure from the Cornell community, prior to the expiration of his or her term, and his or her replacement has already been appointed, the replacement shall immediately assume office.

H. The twenty-eight members of the University Hearing Board shall elect an Administrative Chair from among themselves.

II. *THE UNIVERSITY REVIEW BOARD*

The University Review Board shall consist of three voting members: one student, one faculty member nominated by the Dean of University Faculty, and one other employee. The Review Board shall also consist of three alternate members; one student, one faculty member nominated by the Dean of University Faculty, and one other employee. The President shall appoint a non-voting senior member of the faculty, not a member of the University Administration, to serve as chair. The members of the University Review Board shall be selected in the same manner as the members of the University Hearing Board.

A. No person shall serve on the University Review Board who is at the same time a member of the University Assembly, or its Codes and Judicial Committee or Committee on Committees, an employee of the Assemblies, or a member of the University Hearing Board, except for the temporary appointment provision as defined in Title Four V B 1 c.

B. Members of the University Review Board shall serve two-year terms of office which shall begin with the first day of classes in the next academic year.

C. If any board member vacates his or her position by resignation or departure from the Cornell community, prior to the expiration of his or her term, and his or her replacement has already been appointed, the replacement shall immediately assume office.

D. The chair shall have the right to convene the University Review Board.

E. The Review Board may appoint an independent legal advisor who shall advise the Board on all matters relating to the performance of its responsibilities hereunder, and who may be present at any time during hearings and, at the invitation of the Board, during deliberations.

III. *SUMMER BOARDS*

A. All members of the Summer Boards shall be selected according to procedures outlined in Articles I and II of this Title.

B. Not fewer than eight nor more than ten students shall be selected. One shall be appointed to the Summer Review Board and the remaining students to the Summer Hearing Board.

C. Not fewer than eight nor more than twelve faculty members shall be selected. One shall be appointed to the Summer Review Board and the remaining faculty members to the Summer Hearing Board.

D. Not fewer than six nor more than eight other employees shall be selected. One shall be appointed to the Summer Review Board and the remaining employees to the Summer Hearing Board.

IV. HEARING AND REVIEW BOARDS AND PROCEDURES UNDER TITLE TWO (REGULATIONS FOR THE MAINTENANCE OF PUBLIC ORDER)

A. *University Hearing Board*

1. A separate panel for each case arising under these regulations shall consist of eight members as follows: The University Assembly

shall elect seven members, including two students, three members of the faculty recommended by the Dean of Faculty and two non-faculty employees. The President shall name one member, a senior member of the faculty, not a member of the University administration, who shall be the chair and who shall have no vote. A sufficient number of alternate members shall be selected in a similar manner. The terms of faculty and non-faculty employees shall be two years, and the terms for students one or two years.

a. If for any reason a member or alternate member of the Hearing Board is not elected or appointed or does not serve, the President shall appoint a replacement from the appropriate constituency who shall serve for the balance of the unexpired term or period of absence as applicable.

b. The Board may appoint an independent legal advisor to the University Hearing Board who shall advise the Board on all matters relating to the performance of its responsibilities hereunder, and who may be present during hearings and, upon the invitation of the Board, during deliberations.

c. A member may voluntarily withdraw from participation in any case by reason of a conflict of interest or any other good cause. Any Hearing Board member who has personal knowledge of the facts at issue, or has been directly involved in the events at issue, shall be excused. Any board member having knowledge of such facts or circumstances shall call them to the attention of the Board. A member shall be excused, for such reasons, by a majority vote of the Board after consultation with the legal advisor, if such advisor has been appointed. In the event that a member is excused, an alternate member shall be selected, as hereinbefore provided.

B. *Hearing Procedure*

1. The University Hearing Board shall schedule a hearing to be held within twenty-one (21) days after the date that charges have been brought. It shall cause a written notice to be served upon the accused person, at least 48 hours in advance of the hour set for his or her hearing, which notice shall clearly set forth (1) the time and place of the hearing, (2) the nature of the charges against the accused, and (3) the right to be accompanied by the Judicial Codes Counselor or an advisor or counsel of choice, to hear the evidence against him or her, to cross-examine witnesses, and to give evidence in his or her own behalf.

2. At any hearing, charges preferred by the President shall be presented by a designated representative on behalf of the University and as the representative of the President.

3. While the strict rules of evidence do not apply, the Board shall endeavor to evaluate all of the relevant facts of a given case. In all cases the complainant shall have the burden of producing a

sufficient quantity of evidence to sustain the complaint and shall have the burden of persuading the hearing panel that the evidence is sufficiently credible to justify a ruling in favor of the complainant. In every case the complainant's burden of persuasion is met when a violation has been proven by clear and convincing evidence.

4. No charge may be brought more than six months after the alleged violation occurred.

5. The chair shall control the conduct of all hearings and shall make such procedural rulings as may be necessary to assure fairness, to expedite the proceeding, and to avoid unnecessary delay. The Board may overrule any such decision by majority vote.

6. The Hearing Board may order the joinder of cases for trial which present common questions of law or fact.
   a. The prosecutor, in a verified affidavit, may affirm that each defendant performed acts sufficiently similar that the facts presented in evidence would not differ materially from one defendant to another. In such case, the Board may order joinder of such cases for trial.
   b. Any defendant, whose case is joined, may submit a verified affidavit to the Board seeking to be excluded from the joint trial on the ground that (1) the defendant is not charged with the same offense, at the same time and place, or (2) that the facts material and relevant to the charge would differ materially from the facts applicable to the other defendants. Such case, with the consent of the prosecutor or at the direction of the Board, may be severed from the joint trial.
   c. The Board may permit any person tried jointly and found guilty to submit either a written or oral statement regarding mitigating circumstances but shall be required to permit such a statement regarding mitigating circumstances before imposing a penalty of expulsion or suspension for the balance of a term or longer.
   d. The Board may consider differences between the conduct and circumstances of each individual defendant before imposing a penalty.

7. All hearings of the Hearing Board shall be in private, unless an accused requests a public hearing at least 48 hours in advance. In that event, the Board shall convene in quarters which accommodate a reasonable number of the public and may limit such numbers in the interest of preserving the decorum and dignity of the proceeding. Witnesses may be excluded at the discretion of the chair except for the period of their examination or cross-examination.

8. A majority of the members shall constitute a quorum for any hearing. Decisions of the Hearing Board shall be rendered by a majority vote of board members present.
9. In the event of the unexcused failure of an accused person to appear at the designated time and place for his or her hearing, the Board shall either suspend the accused person temporarily, pending his or her appearance, or hear evidence and proceed to a judgment in the absence of the accused.
10. The Hearing Board shall proceed to decision as expeditiously as possible and shall notify the President and the accused of its decision without delay.
11. The Hearing Board may adopt additional procedures not inconsistent herewith and consistent with fairness and justice.

C. *University Review Board*

1. The panel for cases arising under these regulations shall consist of four members: Three members shall be elected by the University Assembly, as follows: one student, one member of the faculty recommended by the Dean of Faculty and one non-faculty employee. The President shall appoint a non-voting senior member of the faculty, not a member of the University administration, to serve as chair.
2. The decision of the Hearing Board shall be affirmed unless found to be (1) against the weight of the evidence produced before the Hearing Board, or (2) the result of substantial error, including a mistaken interpretation or application of these regulations.
3. The Review Board may also appoint an independent legal advisor who shall advise the Board on all matters relating to the performance of its responsibilities hereunder, and who may be present at any time during hearings and, at the invitation of the Board, during deliberations.

D. *Appeal Procedure*

1. Any person against whom a penalty has been imposed by the Hearing Board shall have the right to appeal the decision provided he or she serves upon the President or a designated representative a written notice of appeal. Similarly, the President or a designated representative may appeal a Hearing Board determination, on the grounds specified by section C 2 above, by service of written notice of appeal upon respondent and the chair of the Review Board. Such notice shall be served not more than five (5) days following the date of the decision of the Hearing Board.
2. The appeal hearing shall be scheduled within ten (10) days after the notice of appeal has been served. The appellant and respon-

dent shall be served with written notice not less than five (5) days in advance of the time and place for such hearing.

3. A faculty member upon whom the penalty of dismissal has been imposed may elect to have his or her case reviewed by a hearing board as provided in the Faculty Dismissal Procedure established by the University Board of Trustees on April 28, 1951, in lieu of appealing to the University Review Board, by giving similar written notice to the President or a designee within ten (10) days after the Hearing Board's decision.

4. Any penalty imposed on non-faculty employees is subject to review either pursuant to applicable grievance procedures or by appeal to the University Review Board, as the employee may elect.

5. The University shall be represented before the University Review Board by a representative designated by the President.

6. The Review Board shall determine whether its hearings shall be conducted in public or in private; however, all deliberations of the Review Board shall be in private.

7. Decisions of the Review Board shall be rendered by a majority vote of board members present. The majority of members shall constitute a quorum for any hearing.

8. The University Review Board shall have the power to affirm, reverse or modify a decision. A penalty shall not be increased. A penalty may not be decreased unless the Review Board concludes that such measure is necessary and appropriate in the interests of justice. Its decisions shall be final. No new evidence may be introduced into the record on appeal. Otherwise, the Review Board may adopt additional procedures not inconsistent herewith and consistent with fairness and justice, which procedures may include remand of the case to the Hearing Board to hear any evidence newly discovered after the hearing before the Hearing Board.

E. *Service*

1. Service of any notice under these regulations shall be sufficient if accomplished by delivery of the notice to the person to be served or to his or her last known address as contained in the official records of the University or by mailing by registered or certified mail to his or her last known address as contained in the official records of the University.

2. In the case of service of a notice of appeal upon the President or a designated representative, delivery to the office of the President or designee shall constitute sufficient service.

F. These Regulations may be amended by the Board of Trustees upon the recommendation of or after consultation with the University Assembly or its successor.

V. *HEARING AND REVIEW BOARDS UNDER TITLE THREE (REGULATIONS FOR THE MAINTENANCE OF THE EDUCATIONAL ENVIRONMENT)*

A. *Hearing Panels for Title Three Cases*

1. In cases involving a complaint against a student, a Hearing Panel shall be composed of three students, one faculty member, and one employee, all from the Hearing Board.
2. In cases involving a complaint against a member of the faculty, a Hearing Panel shall be composed of three faculty members, one student and one employee, all from the Hearing Board.
3. In cases involving a complaint against an employee, a Hearing Panel shall be composed of three employees, one student, and one faculty member, all from the Hearing Board.
4. The President shall name one member, a senior member of the faculty, not a member of the University administration, who shall be the chair and who shall have no vote.
5. Random selection of the Hearing Panels shall be made by the Administrative Chair of the Hearing Board.

B. *The University Review Board*

1. The University Review Board shall consist of three voting members: one student, one faculty member recommended by the Dean of the University Faculty and one other employee. The President shall name one member, a senior faculty member recommended by the Dean of the University Faculty, not a member of the University administration, who shall chair and who shall have no vote. The members of the University Review Board shall be selected in the same manner as the members of the University Hearing Board.
    a. The University Review Board also shall consist of three alternates: one student, one faculty member recommended by the Dean of the University Faculty, and one other employee. The alternate members of the University Review Board shall be selected in the same manner as the members of the University Hearing Board.

    b. In the event that a University Review Board member disqualifies him or herself, is disqualified, or is otherwise unavailable for a particular case, the alternate University Review Board member from the same constituency as the absent member, shall sit in his or her place for the particular hearing.

    c. In cases identified in Title Four V B 1 b above, where the alternate University Review Board member either has not been appointed by the University Assembly or is otherwise unavailable, the Executive Committee of the University Assembly, on recommendation of the Codes and Judicial Committee of the University Assembly, may appoint a present member of the University Hearing Board to sit in place of the absent Review Board member. This appointment shall be made by random selection. The appointment shall be only for a single case for which the Review Board member is absent. The University Hearing Board appointee shall be from the same constituency as that of the absent Review Board member and must not have sat on any panel that heard the case below.

2. The chair shall have the right to convene the University Review Board.

3. The Review Board may appoint an independent legal advisor who shall advise the Board on all matters relating to the performance of its responsibilities hereunder, and who may be present at any time during hearings and, at the invitation of the Board, during deliberations.

VI. *JUDICIAL OFFICES*

A. *Office of Judicial Administrator*

1. The Judicial Administrator shall not be a member of the University or Employee Assemblies or any of their committees or boards, or of either judicial board. In October of the year preceding the expiration of the term of the Judicial Administrator, or upon the chair's receipt of notice of the Judicial Administrator's resignation, the chair shall convene a five-member search committee, to include two members appointed by the President and three members appointed by the University Assembly to propose two or more nominees to the President. The President shall appoint a candidate with the concurrence of the University Assembly. In the event of an unexpected vacancy, the Assistant Judicial Administrator shall be appointed by the President, with the concurrence of the University Assembly, to serve until a permanent Judicial Administrator is approved.

2. The Judicial Administrator shall be appointed for a two-year term; a Judicial Administrator can be renominated by the President for additional terms.

3. The Office of the Judicial Administrator shall be independent. He or she shall be subject to removal during the term of office only by action of the Board of Trustees.

4. The Judicial Administrator shall be solely responsible for the Office of Judicial Administrator.

B. *Office of the Judicial Codes Counselor*

1. The Judicial Codes Counselor shall be appointed by the President of the University with the concurrence of the University Assembly according to the procedures for the appointment of the Judicial Administrator. The Judicial Codes Counselor shall not be a member of the University, Student, or Employee Assemblies, or any of their committees or boards, or of either judicial board.

2. The Judicial Codes Counselor shall be appointed for a two-year term; a Judicial Codes Counselor can be renominated by the President for additional terms.
3. The Office of the Judicial Codes Counselor shall be independent. He or she shall be subject to removal during the term of office only by action of the Board of Trustees.
4. The Judicial Codes Counselor shall be solely responsible for the Office of the Judicial Codes Counselor.

VII. *OTHER PARTIES TO JUDICIAL PROCEEDINGS*

A. *Complainant*

1. In cases in which an investigation is initiated by the Judicial Administrator, the University community shall be designated as the complainant.
2. In cases in which the complaint is originated by an individual(s) in the University community, other than the Judicial Administrator, such individual(s) shall be designated as the complainant(s). However, in cases concerning violations described in Title Three, Article II, A through F and H or in cases involving injury to University property, "Cornell University" (the corporation) may be named as complainant.

B. *Defense Counsel*

1. When he or she appears before the Judicial Administrator, the University Hearing Board, the University Review Board or other University officials acting in a judicial capacity, a defendant has the right of counsel by an individual of his or her choice.
2. The counsel for the defendant may be selected from any member of the Cornell community or general public.
3. The defendant has the option of seeking assistance from the Office of the Judicial Codes Counselor in the selection of counsel. Any information which the defendant reveals to the Judicial Codes Counselor shall be confidential unless the defendant expressly requests that the information in question be referred to another party.
4. The defendant shall have the right of acting as his or her own counsel.

VIII. *PROCEDURES UNDER TITLE THREE* (REGULATIONS FOR THE MAINTENANCE OF THE EDUCATIONAL ENVIRONMENT)

A. *Investigation*

1. The Judicial Administrator shall promptly cause an investigation to be made:
    a. Upon receiving a complaint alleging a non-job related violation of the Campus Code of Conduct, or any other document

enforceable by the campus judiciary system pursuant to the University Assembly or Trustee legislation, or;

b. Upon determining that a complaint referred to him or her by a supervisor or department head or through jurisdictional appeal is non-job related, or;

c. Upon receiving information that a non-job related violation may have occurred when no complaint has been made.

2. During the course of an investigation, the Judicial Administrator, before proferring formal charges, may interview the parties involved. Prior to this interview the Judicial Administrator shall, in writing, inform the parties of:

   a. The matter to be discussed and the party's alleged relationship to it.

   b. The services of the Office of the Judicial Codes Counselor.

3. In cases involving allegations of harassment, abuse, assault, rape, or other menacing activity, the Judicial Administrator, after making a reasonable effort to meet with the accused, may issue a Temporary Order of Protection.

   a. The Office of the Judicial Administrator shall have on file the exact terms of the Temporary Order of Protection and these shall be made available to the accused as soon as the Temporary Order of Protection is issued. The Temporary Order of Protection shall not require the accused to withdraw from a class or to change his/her place of residence.

   b. In the event the Judicial Administrator is notified of a violation of the terms of the Temporary Order of Protection, the accused shall be provided with an opportunity to review the matter with the Judicial Administrator within 48 hours. If the Judicial Administrator determines, based upon the information available, that the Temporary Order of Protection has been violated he/she may suspend the accused pending determination of the underlying charges.

   c. In the case of the suspension pursuant to paragraph b, the accused may petition the University Review Board for a review of the decision to suspend. The Review Board would meet as soon as possible, but no later than 5 days after the petition is filed, to review the petition. If the University Review Board determines that the Temporary Order of Protection was not violated it shall lift the suspension immediately.

   d. A suspension hereunder shall remain in effect until expiration or until lifted by the University Review Board pursuant to paragraph c.

   e. The Judicial Administrator may, in his/her judgment, rescind the Temporary Order of Protection or lift a suspension should he/she determine the circumstances no longer require such action.

f. In the event that the Judicial Administrator issues a Temporary Order of Protection against the accused, the Temporary Order of Protection alone shall not create a disciplinary record.

B. *Summary Decision*

1. The Judicial Administrator and the alleged violator may agree, in writing, to a summary decision before formal charges are filed, subject to the limitations outlined in this legislation. If a summary decision is reached, the Judicial Administrator shall send a notice of the formal accusation and of the provisions of the summary decision to the defendant. Summary decisions in these cases shall become final 48 hours after the defendant's receipt of the formal charges. Notice of a summary decision shall be given to a complainant no more than 48 hours after the initial summary decision becomes final.

2. The Judicial Administrator shall determine, without undue delay, whether to refer the matter to the University Hearing Board or to offer a summary decision.

3. In the event that the summary procedure is employed:

   a. The only penalties that may be assessed (via summary decision) shall be written reprimands, community service, and/or fines.

   b. The Judicial Administrator and the accused shall be allowed to reach agreement within the full spectrum of remedies prescribed in Title Three, Article III B.

   c. A summary decision shall not become final and binding (subject to the provisions of Article VIII C 1 (a) of this Title) until 48 hours after the initial agreement.

   d. The Judicial Codes Counselor shall be notified of each summary decision as soon as possible where the defendant has previously sought the assistance of the Judicial Codes Counselor.

C. *Hearing*

1. Circumstances under which referral may be made to the Hearing Board.

   a. If a complainant is dissatisfied with the decision of the Judicial Administrator not to prefer charges or with a summary decision which has been accepted by the defendant, he or she can within 72 hours after the decision becomes final request in writing a review of the decision by the full membership of the University Hearing Board.

2. Notification

   a. If, as a result of an investigation, the Judicial Administrator determines that there is reasonable cause to believe that a violation has been committed, and a summary decision has not already been reached, then the case shall be referred to a panel of the University Hearing Board. The Judicial Administrator shall:

(1) File charges immediately following the determination of reasonable cause.

(2) Make a good faith effort to serve notice of the charges within seven (7) days of the filing of charges, not including the date of receipt but including the date of the filing.

(a) By personal service, or if after diligent effort, personal notice is impossible to effect, or

(b) By certified mail, return receipt requested, and with notice placed under the door, to the alleged violator's last local address of record with the University.

b. In cases where no summary decision has been reached, notice of the charges shall contain:

(1) The formal accusation.

(2) Instructions to contact the Judicial Administrator within four (4) working days of his or her receipt of notice, not including the date of receipt but including the date contact is to be made so that the time of an appearance of the accused before the Judicial Administrator may be agreed upon by both parties. If the accused fails to respond within the time specified or to agree to appear with a reasonable time, the Judicial Administrator may, at his or her discretion, forward the case to the University Hearing Board.

(3) Notice of the nature of the evidence to be used against the accused.

(4) A brief summary of the services and location of the Office of the Judicial Codes Counselor.

c. Names and written statements of witnesses to be called at a hearing by the Judicial Administrator or the accused, if known at the time, shall be exchanged no later than 72 hours prior to the hearing, except where a witness requests anonymity for reasons of personal protection. In the latter case anonymity will be granted on the condition that the expectation of possible harm is reasonable, though the witness must still supply a written statement to the opposing party. The Hearing Board, in its discretion, may exclude a witness when it determines that the Judicial Administrator or the accused has failed to comply with this provision.

d. In the appearance specified in Article VIII C 2 b (2) of this Title, the accused shall be again informed of his or her right to access to the Office of the Judicial Codes Counselor, and shall be referred to the Campus Code of Conduct and supplementary information, so that he or she might be made aware of:

(1) The procedures of the Office of the Judicial Administrator and the procedures of the judicial boards;

(2) The alternative procedures provided for in job-related cases;

(3) The right to be accompanied by an advisor or counselor of his or her choice;

(4) Other rights and options that may be available to a defendant.

e. When a case is referred to the Hearing Board, the Judicial Administrator shall:

(1) Make a good faith effort to ensure that the defendant and complainant know of the hearing at least seven (7) days in advance of the hour set for the hearing, not including the date of imparting the information, but including the date of the hearing (unless a shorter time is agreed upon by the accused). If the Judicial Administrator has been notified that a defendant has consulted the Judicial Codes Counselor, the Judicial Administrator shall promptly notify the Judicial Codes Counselor of the hearing by telephone or campus mail.

(2) Notify the defendant by:

(a) Personal service, or if after diligent effort, personal notice is impossible to effect,

(b) Certified mail, return receipt requested, and with notice placed under the door, to the alleged violator's last local address of record with the University.

(3) Notify the complainant by regular United States Mail.

(4) Set forth in the notice:

(a) The time and place of the hearing.

(b) Specification of the charges against the defendant.

(c) The defendant's right to be accompanied by an advisor or counsel of his or her choice, to hear the evidence against him or her, to question witnesses and to give evidence in his or her own behalf.

(5) Work with the Department of Residence Life in cases in which the victim and the defendant live in the same residence hall and there is a substantial danger of future harm or misconduct, to determine whether the Department of Residence Life should relocate the victim or the defendant to another residence hall.

3. University Hearing Board

a. Parties to the Hearing

(1) The Administrative Chair shall have the right to convene the University Hearing Board or any panel thereof.

(2) The Board may appoint an independent legal advisor to the Board who shall advise the Board on all legal matters relating to the performance of its responsibilities hereunder, and who may be present during hearings and, upon the invitation of the Board, during deliberations.

(3) At least four members of a five person hearing panel must sit for a given case and at least three votes shall be required for conviction.

(4) When the Board meets for purposes other than adjudication, each faculty member will have 3/4 of 1 vote.

b. Procedures

(1) The University Hearing Board shall meet to hear a complainant's appeal of a summary decision within twenty-one (21) days of receipt by the Judicial Administrator of a written request for review.

(2) A hearing panel of the University Hearing Board shall hold a hearing within twenty-one (21) days of receipt of charges by the Administrative Chair of the Board, unless the same be adjourned by the Administrative Chair or the chair of the panel for good cause shown.

(3) At any hearing, the charges shall be presented by the Judicial Administrator in the name of the complainant. A complainant shall have the right to be accompanied at every stage by a personal advisor, who shall not be a witness and shall not participate in a hearing in a representative capacity. A victim shall have the right to be present at a relevant hearing, whether or not the victim is a member of the Cornell community. Members of the Board may question witnesses and adduce evidence. This shall not preclude parties to the hearing from questioning witnesses. Strict rules of evidence shall not apply and the Board shall receive relevant information that is reasonably reliable. The Board shall have the power to establish its own rules of evidence, and need not accept as evidence reports of the defendant's testimony at the summary hearing by the Judicial Administrator. The Board shall endeavor to evaluate all the relevant facts of a given case.

(4) Knowledge of the events at issue shall not disqualify a member of the Hearing Board, unless he or she has a personal knowledge of the events at issue, has been

directly involved in the events at issue, or is an interested party with regard to the outcome of the hearing.

(5) The hearing panel chair shall conduct all hearings.

  (a) He or she shall make such procedural rulings as, in his or her discretion, may be necessary to assure fairness and to avoid undue delay.

  (b) He or she shall apply the procedures of the Board, as developed by the Board, and the University Assembly so as to assure fairness and to avoid undue delay.

  (c) All procedural rulings of the hearing panel chair shall be subject to the approval and concurrence of the hearing panel as a whole. The hearing panel may overrule the procedural rulings of its chair by majority vote.

  (d) Evidence of a victim's sexual conduct shall not be admissible unless fairness to the defendant requires consideration of such evidence.[7]

(6) All hearings shall be private unless the defendant notifies the Office of the Judicial Administrator that he or she wishes a public hearing 48 hours before the hearing is held. All hearings in cases of sexual harassment, abuse or assault, or of rape shall be private and the defendant shall not have the option of requesting an open hearing. Witnesses shall be excluded except for the period of their questioning in all hearings.

  (a) The hearing panel shall maintain order in the hearing room.

  (b) All deliberations by the Hearing Board or its panels shall be in private.

(7) Failure of the defendant to appear at the time and place designated for his or her appearance before the Judicial Administrator or the University Hearing Board, or one of its panels, shall be grounds for the University Hearing Board, or one of its panels, to impose a temporary suspension or summarily grant the remedies requested by the complainant, unless the Judicial Administrator, the University Hearing Board, or one of its panels, respectively, excuses the failure for good cause shown. In cases in which the defendant is an organization, the University Hearing Board, or a panel thereof, as the case may be, may summarily grant the remedies sought by the complainant unless the Judicial Administrator, the Uni-

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[7] See Section 60.42 of the New York Penal Law for guidance as to the application of this provision.

versity Hearing Board, or one of its panels, respectively, excuses the failure for good cause shown.

(8) Failure of the complainant to appear, unless excused for good cause shown as determined by the panel, shall result in a loss of his or her right to the assessment of a remedy in his or her favor by the panel.

(9) Should the defendant be excused from appearing at a given time he or she shall have the option of having the case heard in absentia, with the privilege of submitting written evidence, or of having a new date set for a hearing.

(10) The hearing panel of the University Hearing Board or the Board itself, as applicable, shall proceed to a decision as expeditiously as possible.

(11) The Judicial Administrator shall serve notice of the decision of the Board or panel to the defendant and complainant within 48 hours of the Judicial Administrator's receipt of the decision.

(12) Records

(a) A verbatim record shall be kept of all proceedings, but not of deliberations, and made available to the complainant within the allotted time for appeal, and to the defendant at any time.

(b) All decisions of the judicial boards must be in writing, including rationale and dissenting opinions with the exclusion of the names of the individuals involved. These records shall be available upon request in the Offices of the Judicial Codes Counselor and the Judicial Administrator.

(13) Confidentiality

The Judicial Administrator and the Judicial Codes Counselor shall protect the confidentiality of all judicial records except those records specifically named in Article VIII C 3 b (12) (b) of this Title.

4. University Review Board

a. Hearing Panels

(1) All members of the University Review Board shall be scheduled to sit for a given case.

(2) Decision of the Review Board shall be rendered by a majority vote of the members present. The majority shall constitute a quorum for any hearing.

b. All defendants have the right to appeal to the University Review Board.

c. Appeals shall be initiated as follows:

  (1) A defendant against whom a penalty has been imposed or a remedy assessed shall have the right to appeal a decision of a hearing panel to the University Review Board. He or she shall file notice of the appeal with the Judicial Administrator within ten (10) days of his or her receipt of the notice of the decision.

  (2) Any complainant, other than the University community as defined in Title Four, Article VII A 1, shall have the right to appeal the decision of the panel to the University Review Board, but only in cases where remedies are sought.

d. Appeals may be based upon:

  (1) Any violation by the Hearing Board, or any of its panels, in the fair application of the procedures established by University Assembly, or Trustee legislation, or the internal procedures adopted by the Hearing Board members, if such violation may have had a prejudicial effect upon the outcome of the hearing.

  (2) The discovery of additional evidence after the hearing which may have an effect upon the outcome of the hearing.

  (3) The defendant's belief that the penalty and/or remedy imposed upon him or her is unjust.

  (4) The complainant's belief that the remedy awarded him or her is not commensurate with the injury.

e. Notification

  (1) The appellant shall file notice of appeal with the Judicial Administrator within ten (10) days of his or her receipt of the notice of the decision.

  (2) The appellant and respondent (if there is one other than the Judicial Administrator) shall be notified of the time of the hearing no later than seven (7) days after notice of appeal is filed, and no less than seven (7) days in advance of the hearing.

  (3) The Board shall meet to hear an appeal within twenty-one (21) days of the date that the notice of appeal is filed, unless a postponement, for a good cause shown, is granted by the chair on request.

f. Disposition of Appeals

  (1) Any decision of the University Review Board shall be based solely on the record of the hearing, and/or in appropriate cases, upon a showing of new evidence. The

Board shall remand a case to the hearing panel from which it originated on a showing that new evidence has been discovered after the hearing which could affect the outcome of the hearing process.

(2) The University Review Board may:

- (a) Uphold the hearing panel decision,
- (b) Reverse a conviction,
- (c) Reduce a penalty,
- (d) Modify a remedy,
- (e) Remand a case to the hearing panel from which it originated for a new hearing,
- (f) Remand a case to a newly composed hearing panel in appeals of procedural violations.

g. Suspension Pending Hearing Under Title Three Violations

(1) In extraordinary circumstances and for the purpose of assuring public order and safety, the President or a designated representative shall have discretionary power to suspend the accused person temporarily pending the hearing of charges against him or her by the University Hearing Board.

(2) The Judicial Administrator may accept from the President this power to temporarily suspend pending hearing, but only if the Judicial Administrator may exercise the power at his or her own discretion.

(3) When the President or a designee exercises the above-outlined power to suspend a person from his University-related status pending a hearing, these procedures shall be followed:

- (a) Within 48 hours after any person is suspended, the University Review Board shall meet to determine whether good cause has been shown for the exercise of the President's suspension power.
- (b) If the University Review Board determines that (a) good cause has not been shown for the suspension, or (b) that circumstances have changed so that suspension is no longer necessary, the suspension shall be lifted immediately.
- (c) If the suspension remains in effect after the University Review Board's initial meeting, upon motion by any member of the Board or upon the request of any suspended person, the Board may decide to reconvene to determine whether circumstances no longer require suspension.

5. Summer Board Procedure

   Summer boards shall be convened by the Judicial Administrator. Such boards shall follow all procedures pertaining to their respective boards insofar as they are applicable.

D. *General Provisions*

1. Any charge of a violation of Title Three of the Campus Code of Conduct must be initiated by the bringing of charges by the Judicial Administrator within one calendar year of the date of the alleged violation. Exceptions to this policy which extend the period beyond one year are:

   a. In cases where the charge is fraud, the period shall be one calendar year from the alleged fraud or sixty (60) days from the discovery of the fraud, whichever is longer, but in any event no more than three (3) calendar years from the alleged fraud.

   b. In cases where the individual to be charged is absent from the University due to either:

      (1) a leave of absence,

      (2) termination of employment, or

      (3) a withdrawal as a student,

      a charge may be brought within one calendar year of the date of the alleged violation or within sixty (60) days of his or her return to the jurisdiction of the University judicial system, whichever is later.

   c. In cases where the individual to be charged is also facing pending criminal prosecution involving the same matters, a charge may be brought within sixty (60) days of the final disposition of such criminal prosecution. Should it appear that the individual will leave the University before such a time, the President or the President's designee may cause the individual's degree to be withheld. Any such action shall remain in effect for the period of time in which the University may file charges.

   d. The University Hearing Board may extend any period by up to an additional six (6) calendar months upon a petition from the Judicial Administrator and a showing of special or unique circumstances justifying such an extension provided that such petition is made to the Hearing Board prior to the initial expiration of the period.

2. No final decision of the campus judicial system shall be reviewed by any other authority within the University.

3. No person shall be denied due process in the campus judicial system. Due process shall include the following:

   a. No person shall be denied the right to question witnesses or to confront his or her accusers.

  - b. No person shall be compelled to testify against him or herself.
  - c. Confidential relationships currently protected under federal and state law shall be protected under this system.
  - d. No person shall endure cruel and unusual punishment.
  - e. No person shall be denied the right to present evidence and witnesses in his or her own behalf.

4. The Judicial Administrator, any University Hearing Board panel, or the University Review Board may grant transactional immunity from prosecution within the judicial system to witnesses.
5. Violations, penalties, and remedies shall be recorded in the Office of the Judicial Administrator and/or Director of Public Safety in all cases arising under the University judicial system. Copies of such records shall not be released to outside sources without written consent of the subject of such record, except as may be required by law.[8]
6. Notifications of violations, penalties, and remedies concerning the offender shall be sent as directed by the Hearing Board to the University officials necessary to make the penalties and remedies as effective and to other persons who might provide counseling assistance to the offender.[8]
7. The judicial boards shall be responsible for establishing their own internal rules and procedures not specified elsewhere.[9]
   - a. Such rules and procedures must be published in the *Cornell Chronicle* before going into effect.
   - b. Any future changes in rules and procedures must be published in the *Chronicle* at least 30 days before taking effect.
8. The Judicial Administrator shall annually report to the University Assembly on the operation of the office and the judicial system as a whole.
9. The judicial boards shall report upon request to the University Assembly Codes and Judicial Committee.

IX. *JURISDICTION*

A. *Jurisdiction of the Judicial System*

All violations of the Campus Code of Conduct by a student, faculty member or University employee shall be processed through the judicial system, consistent with the principles at Title One, Article II, except as provided at F. below.

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[8] See also Article VIII, C 3 b (12) and (13) of this Title in this publication and *Policy on Access to and Release of Student Education Records.*

[9] Copies are available in the Offices of the Judicial Administrator and of the Judicial Codes Counselor.

While the Campus Code of Conduct establishes standards of conduct applicable to all students, faculty members or University employees, the term student as used herein shall be interpreted to mean any person currently registered with the University as a degree candidate in any of Cornell's undergraduate or graduate divisions, a special student in the undergraduate divisions, or a non-degree candidate in the graduate school.

B. *Jurisdiction of the Judicial Administrator*

The Judicial Administrator shall:

1. Receive and investigate complaints concerning alleged violations of the Campus Code of Conduct and such other documents as the University Assembly may direct;
2. Initiate investigation of possible violations of these documents where there have been no formal complaints;
3. Prefer charges alleging such violations;
4. Inform defendants of such charges in writing;
5. Insure that defendant is aware of: all the rights and options available to him or her; the procedures of the Office of Judicial Administrator and judicial boards; the alternative procedures described in F. below; has right to counsel; and his or her right of access to the Office of the Judicial Codes Counselor.
6. On request of University officials, the Judicial Codes Counselor, committees, boards, or other judicial mechanisms as hereafter described, to provide a copy of charges made against the defendant.
7. Research a summary decision acceptable to the defendant; or refer the case to the University Hearing Board for adjudication.

C. *Jurisdiction of the University Hearing Board*

1. a. A five-person panel of the University Hearing Board shall hear cases involving alleged violations of Title Three, and shall review decisions of the Office of the Judicial Administrator as provided for in Article IX B above.

   b. An eight-person panel of the University Hearing Board shall hear cases involving alleged violations of Title Two (Regulations for the Maintenance of Public Order) of the Campus Code of Conduct.
2. A twelve-person panel of the University Hearing Board shall review instances in which the complainant is dissatisfied with the action taken by the Judicial Administrator on the complaint.
   - a. The University Hearing Board, at least five (5) members concurring, can:
     - (1) Uphold the decision of the Judicial Administrator;

   (2) Order the Judicial Administrator to reopen the investigation; or

   (3) Order the Judicial Administrator to prefer formal charges so that the case can be adjudicated by a panel of the University Hearing Board.

3. The University Hearing Board shall upon adjudication find the defendant not guilty and dismiss the case, or find the defendant guilty and impose a penalty and/or a remedy.

D. *Jurisdiction of the University Review Board*

1. The University Review Board shall hear appeals of cases decided by hearing panels of the University Hearing Board.
2. The University Review Board shall review any suspension imposed under Title Three by the President of the University or a designee, pending hearing by the University Hearing Board.

E. *Jurisdiction of the Summer Boards*

1. The jurisdiction of the Summer Boards shall extend from the day following the last day of the spring term examination period to the day preceding the first day of classes of the succeeding fall semester.
2. The jurisdiction of the Summer Boards over students applies only to those summer students registered in Cornell credit courses.

F. *Dual Jurisdiction*

1. Should any complaint of such a violation[10] be made to a supervisor, department head or the Judicial Administrator, or should a supervisor or department head accuse an employee or faculty member of a violation which involves conduct clearly arising in the course of employment, determination of guilt or innocence shall be made by the appropriate University administrative authority or department head who shall also assess penalties and/or remedies where appropriate.
   a. The accused may make a jurisdictional appeal; i.e., a question whether the alleged conduct arose in the course of employment and calling for rechanneling into the judicial system, to the Judicial Administrator. Such appeal shall be successful only in the event that the Judicial Administrator finds the conduct to be non-job related upon consultation with the Dean of Faculty or Director of the Office of Human Resources (as appropriate).
   b. The accused may make an appeal on the merits of administrative action through the employee grievance procedure or appropriate faculty channels but not through the judicial system.

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[10] A violation of the Campus Code of Conduct.

2. If a complaint comes to a supervisor or department head about the conduct of an employee or faculty member not arising in the course of employment or about which there is uncertainty, the complaint shall be referred to the Judicial Administrator for channeling into the administrative action process or the judicial system. The criterion on which the Judicial Administrator shall channel in the foregoing cases as well as in cases where the complaint is made to the Judicial Administrator is whether or not the conduct of the accused is job-related. In reaching such a decision the Judicial Administrator shall consult with the Dean of Faculty if the case involves a faculty member or the Director of the Office of Human Resources if the case involves an employee other than a faculty member. The Judicial Administrator shall make his or her own decision after such consultation.

3. Upon imposition of a penalty of dismissal or suspension upon a faculty member by the University Hearing Board, such faculty member may choose to appeal to an arbitration committee (as described in Trustee legislation of April 28, 1951, titled Faculty Dismissal Procedure) in lieu of appeal through the University Review Board. Similarly, any penalty imposed on non-faculty employees is subject to review either pursuant to applicable grievance procedures or by appeal to the University Review Board as the employee may elect.

X. *INTERPRETATION AND MODIFICATION*

A. The Regulations for the Maintenance of Public Order constituting Title Two and Article IV of Title Four hereof, are adopted by the Board of Trustees and may be amended only by action of the Board of Trustees. Therefore, no term of any other article or provision of the Campus Code of Conduct shall be interpreted to amend, supplement, or modify, in any manner, any provision of the Regulations for the Maintenance of Public Order.

B. Nothing contained in these regulations shall impair the right of the University to take such action as may be necessary or appropriate for the purposes of construction and repair of facilities, of regulating vehicular and pedestrian traffic, and of maintaining order and safety.

C. All Titles of the Campus Code of Conduct except Title Two and Title Four, Article IV may be amended by the University Assembly subject to the approval of the President.

D. The "Principles and Policies Governing the Community Judiciary Systems," "Campus Code of Conduct," "Uniform Penalties and Remedies Act of 1971" and "Judicial Reform and Restructuring Act of 1972" are hereby repealed.

E. The rights, duties and liabilities of any complainant and defendant remain unextinguished except as modified by this legislation which is a consolidation of existing legislation with amendments.

F. This legislation shall become effective as of midnight on May 30, 1987.

STUDENT LIFE POLICIES

GENERAL STATEMENT

Like many urban universities, the University of Houston has grown proportionally faster in recent years than its city setting. During this period, the University of Houston has continued to strive for a spirit of community, an atmosphere that is essential for intellectual growth and achievement. This spirit of community has not been the particular concern of any one person or of any one group. It has gradually evolved from the deepening loyalties of faculty, students, and organizations in the city and throughout the state.

With the spirit of community, the university has nurtured a climate of academic freedom and of freedom of inquiry. Insofar as possible, this climate should enable the University of Houston to solve its own problems, to the extent that they are peculiar to the nature of a university, in an atmosphere of considered deliberation in which all interested parties can participate by means of legitimate representation. This is the purpose of the Student Life Policies. In these policies are found–as clearly defined as possible–the distribution of authority, the identification of rights and responsibilities, the determination for accountability, the application of sanctions, and the mechanisms and guidelines for conflict resolution. These policies are intended to stimulate intellectual excellence in an atmosphere of freedom and to protect the integrity of the university community.

Members of the university community share the same responsibilities of citizenship as other members of the broader community. Students, faculty, and staff members are all subject to the same laws and ordinances. The university does not stand between national, state, or local law enforcement agencies and persons who break the law. Persons who break the law on the campus are subject to action by these agencies and also, when appropriate, to the university's internal discipline procedures.

There will be no retroactive application of any changes in the Student Life Policies. However, future change may supersede policies published herein. Alterations to the policies are published in student and faculty publications and posted on appropriate university bulletin boards.

Policies included herein apply to the University of Houston.

AMENDMENT OF STUDENT LIFE POLICIES

Student Life Policies may be established, deleted, or amended by the approval of a University Bill in accordance with the Constitution and laws of the Students' Association. In addition to the provisions of the Constitution and laws of the Students' Association, the following shall apply to the process for considering Student Life Policy bills:

1. The Senate may take action on the bill only after adequate notice has been given to the university community by the following means:

a. The speaker shall, within two class days of the introduction of the bill, post a copy of the bill in a visible location outside the offices of the Students' Association.

b. The speaker shall, within five class days of the introduction of the bill, place a notice in the *Daily Cougar* announcing the introduction of the bill and other pertinent information concerning the bill and its consideration by the Senate.

c. The speaker shall, within two class days of the introduction of the bill, provide the chairs of the Faculty Senate and the Faculty Senate Campus Life Committee with copies of the bill. The Faculty Senate or its designated committee shall have a period of no less than twenty class days from the time of the bill's introduction to provide the Student Senate with its recommendations regarding the bill.

2. If approved by the Students' Association, the bill shall be sent to the president for approval via the dean of students and the vice president for student affairs, with copies sent to the chairs of the Faculty Senate and Faculty Senate Campus Life Committee.

ALLEGED VIOLATIONS OF BOTH PUBLIC LAW AND STUDENT LIFE POLICY: UNIVERSITY ACTION TO BE TAKEN

In all cases involving public law, statutes, ordinances, student life policies, or university regulations, university action may be taken.

DISRUPTION OF UNIVERSITY OPERATIONS AND EVENTS

(This policy is currently under review. Please contact the Dean of Students Office for more information.)

The right of peaceful protests within the university community must be preserved.

The university has the right to provide for the safety of individuals, the protection of property, and the continuity of the educational process. The university will not permit any individual to disrupt or attempt to disrupt the operation and functioning of the university by any device.

In emergency situations, the president or designated representatives have the responsibility to determine when the conditions cited above prevail and shall have the authority to take such steps as are deemed necessary and reasonable to quell or prevent such disruption.

Prior to an event which is potentially disruptive, the Organizations Board will be convened, whenever time permits, to make recommendations to the dean of students.

ENFORCEMENT OF UNIVERSITY POLICY JURISDICTION

All alleged violations of Student Life Policies contained herein, unless otherwise specified in this section, shall be under the jurisdiction of the Dean of Students Office and the University Hearing Board.

The University of Houston Police Department shall coordinate its investigation with other law enforcement agencies, as necessary, for processing through the criminal court system. However, the university reserves the right to investigate and prosecute any alleged violations of the Student Life Policies and when appropriate enforce sanctions.

Violations of the Organizations Policy shall be under the jurisdiction of the University Hearing Board. University of Houston traffic citations will be evaluated and resolved by Parking and Transportation. Students may appeal parking and traffic citations to the Student Traffic Court.

Violations occurring within the residence halls may be resolved by the appropriate residence halls staff and/or referred to the Dean of Students Office.

STUDENTS DISCIPLINARY POLICIES AND PROCEDURES

Preamble

The University of Houston, as an educational institution, has a special set of interests and purposes essential to its effective functioning. These include (a) the opportunity for students to attain their educational objectives, (b) the creation and maintenance of an intellectual and educational atmosphere throughout the university, and (c) the protection of the health, safety, welfare, property, and human rights of all members of the university, and the property of the university itself. The university has a clear responsibility in the area of student conduct to protect and promote the pursuit of its goals. The Student Disciplinary Policies and Procedures emphasize the university's obligation to promote the personal freedom, maturity, and responsibility of students.

The Student Disciplinary Policies and Procedures set forth those acts which constitute unacceptable conduct for students of the university. All alleged violations of the Student Disciplinary Policies and Procedures may result in referral to the assistant dean of students.

The university does, in addition, reserve the right, for educational purposes, to review any action taken by civil authorities regarding students. It also has the obligation to introduce counseling and/or disciplinary action if the student's conduct has interfered with the university's exercise of its educational objectives or responsibilities to its members. Disciplinary action taken on this basis shall conform to the terms of the Student Disciplinary Policies and Procedures.

The University of Houston supports the concept of educational discipline. When a student is not a danger to the university community, or when a repetition of misconduct is unlikely, the university will make an effort to educate the student through a sanction; but should the student demonstrate unwillingness to obey the rules governing conduct, he will be treated in the same manner as one who has failed academically. Students are expected to adhere and will be held accountable for adhering to all federal, state, and local laws in addition to all university policies and regulations not mentioned herein.

A student admitted to the University of Houston accepts the responsibility to conform to all University of Houston rules and regulations. Proven failure to meet this obligation will justify appropriate disciplinary actions including, but not limited to, expulsion, suspension, disciplinary probation, or reprimand. Although the university will make every reasonable effort to make the rules and regulations available, students are responsible for becoming familiar with them.

The University of Houston Judicial System is the responsibility of the Dean of Students Office in conjunction with the Students' Association. The assistant dean will advise, under the direction of the dean of students, the operational judicial procedures.

1. Gender of Pronouns

Whenever appearing, the pronouns, "he," "his," or "himself" shall be considered gender neutral and shall refer to persons of both sexes.

2. Definitions

2.1 "Assistant Dean" means the Assistant Dean of Students.

2.2 "Board" means University Hearing Board.

2.3 "Code" refers to this Disciplinary Code.

2.4 "Handbook" means the Official Student Handbook.

2.5 "Hazing" means those activities defined in the Texas Education Code Sec. 4.51 et seq and Student Life Policy.

2.6 "Hearing Authorities" include the Dean of Students, Assistant Dean, and Hearing Board.

2.7 "Notice" means correspondence delivered to addressee by mail or in person.

2.8 "Policy" means the Students Disciplinary Policies and Procedures.

2.9 "Preponderance of the evidence" means that the proof need only show that the facts are more likely to be so than not so.

2.10 "Record" means all documents, forms, copies, reports, statements, tape recordings, or tangible evidence presented in a disciplinary hearing or conference.

2.11 "Referral Notice" refers to the notice initiating disciplinary action.

2.12 "Respondent" means accused student.

2.13 "Sanction" means penalty for violation of Disciplinary Code.

2.14 "University" means the University of Houston.

2.15 "University officials" means those persons who have been given the authority and the responsibility by the appropriate agency or person, including regents, officers, faculty, and administrative staff.

2.16 "University property" means property owned, controlled, used, or occupied by the university including property physically removed from campus.

2.17 "Will" and "shall" are used in the imperative sense.

Disciplinary Code

The following acts are defined by the university to be unacceptable. The list may not be all inclusive.

3. Code A Violations

A student found to have violated any of the following regulations will be subject to a maximum sanction of expulsion. Being under the influence of drugs and/or alcohol does not diminish or excuse a violation of the Disciplinary Code.

3.1 *Violation of Probation*–Violation of the code while on probation, or violation of the terms of that probation.

3.2 *Disruption / Obstruction*–Obstructing or interfering with university functions or any university activity.

3.3 *Mental or Bodily Harm*–(a) Intentionally inflicting mental or bodily harm upon any person; (b) taking any action for the purpose of inflicting mental or bodily harm upon any person; (c) taking any reckless, but not accidental action from which mental or bodily harm could result to any person; (d) causing a person to believe that the offender may cause mental or bodily harm; (e) any act which demeans, degrades, or disgraces any person. "Any person" as used in this section may include oneself.

3.4 *Discrimination*–Intentional discrimination against a person on the basis of race, color, religion, national origin, sex, age, disability, veteran status, or sexual orientation except where such distinction is required by law.

3.5 *Destruction of Property*–Intentionally or recklessly damaging, destroying, defacing, or tampering with university property or the property of any person or business on campus.

3.6 *Theft*–Theft of property or services from any person or any business on university property.

3.7 *Possession of Stolen Property*–Possessing property known to the possessor to be stolen and that may be identified as property of the university or any other person or business.

3.8 *Forcible Entry or Trespass*–Forcible or unauthorized entry to any building, structure, or facility and/or unauthorized entry to or use of university grounds.

3.9 *False Report of Emergency*–Causing, making, or circulating a false report or warning of a fire, explosion, crime, or other catastrophe.

3.10 *Misuse of Safety Equipment*–Unauthorized use or alteration of fire fighting equipment, safety devices, or other emergency equipment.

3.11 *Possession of Dangerous Weapons*–Unauthorized possession of a firearm, weapon, dangerous chemicals, or any explosive device of any description, including compressed-air guns, pellet guns, BB guns, or illegal knives.

3.12 *Manufacture, Distribution, Sale, Offer for Sale, or Possession of Controlled Substances*–The manufacture, distribution, sale, offer for sale, or possession of any controlled substances, including but not limited to, barbiturates, hallucinogens, amphetamines, cocaine, opium, heroin, or marijuana.

3.13 *Failure to Appear*–Failing to appear at the request of any hearing authorities.

3.14 *Misuse or Abuse of Computers*–Unauthorized use or misuse of any computer, computer system, service, program, data, network, cable television network, or communication network.

3.15 *Falsification of Records*–Altering, tampering, forging, or knowingly using falsified documents or records of the university (including, but not limited to, UH parking permits and student IDs); being party to falsification; giving or providing false statements, written or oral; and/or providing false information during any university proceeding or to any university official.

3.16 *Violation of Criminal Law*–Alleged violation of any criminal law where the student's conduct interferes with the university's exercise of its educational objectives or responsibilities to its members.

3.17 *Aiding and Abetting*–Assisting, hiring, or encouraging another person to engage in a Code A violation.

4. Code B Violations

A student found to have violated any of the following regulations will be subject to a maximum sanction of disciplinary probation. Being under the influence of drugs and/or alcohol does not diminish or excuse a violation of the Student Disciplinary Policies and Procedures.

4.1 *Unauthorized Use of Property or Service*–Unauthorized use of property or services or unauthorized possession of university property or the property of any other person or business.

4.2 *Disturbing the Peace*–Disturbing the peace and good order of the university by, among other things, fighting, quarreling, or disruptive behavior.

4.3 *Failure to Comply or Identify*–Failure to comply with directions of university officials, police, or any other law enforcement officers acting in the performance of their duties, or failing to identify oneself to these persons when requested to do so.

4.4 *Unauthorized Use of University Keys*–Unauthorized use, distribution, duplication, or possession of any key(s) issued for any building, laboratory, facility, room, or other university property.

4.5 *Misuse of Identification*–Transferring, lending, borrowing, altering, or unauthorized creation of university identification.

4.6 *Unauthorized Use of Alcoholic Beverages*–
(a) Possession, distribution, or consumption of alcoholic beverages except during events or in circumstances authorized by university officials and/or failure to comply with state or university regulations regarding the use or sale of alcoholic beverages. (b) *Public Intoxication*–Being under the influence of alcoholic beverages.

4.7 *Violation of Rules Regarding Residence Halls and Dining Facilities*–Violation of a housing contract or the published rules and regulations of university residence halls and dining facilities.

4.8 *Aiding and Abetting*–Assisting, hiring, or encouraging another person to engage in a Code B violation.

Disciplinary Procedures

The purpose of these procedures is to provide for the orderly administration of the Student Disciplinary Policies and Procedures with the principles of due process of law.

Reasonable deviations from these procedures will not invalidate a decision or proceeding unless significant prejudice to a student may result.

5. Disciplinary Action Initiated

Any person may bring charges under this code and that person may be required to supply information pertinent to the case.

6. Notification and Procedural Interview

6.1 A procedural interview will be scheduled with the assistant dean within three class days after the respondent is notified in writing of an alleged violation of the policy.

6.2 Failure to appear at the procedural interview shall constitute a separate violation of this code and may result in further disciplinary action.

6.3 Copies of the following documents will be made available to the student at the time of the interview:

1. A copy of the Student Disciplinary Policies and Procedures.
2. A copy of the referral notice.
3. A copy of the Students' Rights and Responsibilities form from the Student Disciplinary Code Review and Standards Committee.

6.4 Within five class days of the procedural interview the student is required to choose either a hearing before the Hearing Board or a disciplinary conference with the assistant dean of students. The student shall indicate his choice in writing.

6.5 The assistant dean shall notify the student of the time, date, and place of the disciplinary conference or hearing.

7. Disciplinary Conference

Students electing to participate in a disciplinary conference with the assistant dean are afforded the following procedural protections:

7.1 Written notice of the alleged violations at least three class days prior to the scheduled conference.

7.2 May have access to the case file prior to and during the conference.

7.3 An equal opportunity to respond to the evidence against them and to call appropriate witnesses on their behalf, and to question all other witnesses.

7.4 The right to be accompanied and assisted by an advisor as provided herein.

7.5 The assistant dean will advise the student in writing of his decision within five class days.

8. University Hearing Boards

8.1 A Hearing Board shall be composed of five students appointed by the Students' Association, two faculty members appointed by the Faculty Senate, and two staff members appointed by the Staff Council.

8.2 There will be five alternates: three appointed by the Students' Association, one appointed by the Faculty Senate, and one appointed by the Staff Council.

8.3 A quorum shall consist of five persons, at least three of which shall be students and one shall be faculty or staff.

8.4 The chair will be selected by the board members from the student members, to serve for an academic year.

8.5 The dean of students may remove a board member for justifiable cause. A board member may appeal his removal to the Student Disciplinary Code Review and Standards Committee.

8.6 If a board member resigns, cannot serve, or is removed from office, the dean of students will select one of the alternates to fill the vacancy.

9. Hearing Procedures

The following procedural guidelines shall be applicable in disciplinary hearings:

9.1 Three class days prior to the hearing, the assistant dean will provide, to the respondents, copies of documents relevant to the case and a list of witnesses and their expected testimony.

9.2 The respondent is entitled to an advisor, who may be an attorney, but who sits in an advisory capacity and who addresses the board only upon permission from the chair. Respondents who wish to be represented by an attorney shall notify the assistant dean of the attorney's name and phone number three class days prior to the hearing. Advisors may not appear in lieu of respondents.

9.3 In the event that the university chooses to proceed through legal counsel, the respondent will be notified three class days prior to the hearing and shall also have the right to proceed through counsel. Counsel may not appear in lieu of the respondent.

9.4 Hearings will be closed to the public except when the respondent requests an open hearing. This request must be made in writing to the assistant dean at least three class days prior to the hearing.

9.5 If a respondent fails to appear, the hearing may proceed without him.

9.6 The assistant dean or his designate may present the case for the university or the complainant.

9.7 Prospective witnesses, other than the complainant and respondent, may be excluded from the hearing during the testimony of other witnesses. All participants shall be excluded during board deliberations.

9.8 The hearing will be held in two parts:
(1) Determination of violation;
(2) Determination of sanction.

9.9 The chair will exercise control over the proceedings. Any person disrupting a hearing or who fails to adhere to the rulings of the chair may be excluded from the proceedings.

9.10 Any party may challenge a board member on the ground of personal bias. Board members may be disqualified upon a majority vote of the remaining members of the board, conducted by secret ballot.

9.11 The burden of proof shall be on the complainant or university, whichever is applicable, to prove the case by a preponderance of the evidence.

9.12 The chair shall determine what evidence is admissible. Formal rules of evidence shall not apply.

9.13 Respondent, complainant, and board members may examine the written evidence offered and may question all witnesses.

9.14 Respondent and witnesses may speak on their own behalf; however, they will not be forced to testify against themselves and their silence shall not be used to their detriment.

9.15 At the conclusion of the presentations, the board shall deliberate in closed session. After deliberation and a vote, the decision of the board will be announced to the participants.

9.16 The board may hear evidence concerning the appropriate sanction if the respondent is found to have violated a student life policy. The board may consider the respondent's prior disciplinary record only in order to recommend an appropriate sanction.

9.17 Decisions by the board shall be by majority vote. In the event of a tie, the chair will vote to break the tie.

9.18 Hearings will be tape recorded and, upon request, a copy of the recording will be provided to the respondents at their own cost.

9.19 The board's recommendation will be forwarded to the assistant dean for further action. The assistant dean will advise the respondent of his decision in writing within seven days of the hearing.

10. Sanctions

One or more of the following sanctions may be imposed:

10.1 *Expulsion* prohibits the student from ever attending the university and from being present without permission on university property. Expulsion will be noted on the student's permanent record.

10.2 *Suspension* prohibits the student from attending the university and from being present without permission on university property for the duration of the sanction, which shall not exceed a period of more than one calendar year following its effective date. The assistant dean will determine the effective date.

10.3 *Disciplinary Probation* indicates to a student that his behavior has resulted in a sanction close to suspension. Any further misconduct while on probation may result in expulsion from the university. It is imposed for a definite period of time.

10.4 *Other Sanctions* may include, but are not limited to, restrictions from participating in intercollegiate athletics, extracurricular activities, and residencial life activities; restitution; monetary fines; community service, and/or disciplinary room change for residence students. Students may also be required to meet periodically with a person designated by the assistant dean.

10.5 *Reprimand* is an official written notification to the student that his behavior has been unacceptable.

10.6 *Verbal Reprimand* is used to advise/counsel a student about his behavior.

11. Interim Suspension

11.1 The vice president for student affairs or his designate may interimly suspend a student prior to a hearing if the student's conduct presents a danger to himself or the university community.

11.2 The assistant dean will immediately notify the student(s) of his interim suspension. This notice will include a statement of the regulations that the student allegedly violated, a specific statement of the facts constituting the alleged violation, the time and place of the hearing, and a copy of the university Student Disciplinary Policies and Procedures.

11.3 An extension may be granted to either party by the assistant dean for good cause. If either party fails to appear at a scheduled hearing without a cause, the hearing may proceed in his absence.

11.4 The hearing shall be conducted according to the procedures set forth in Section 13.

11.5 The student may appeal the decision as provided for in Section 14.

11.6 If the decision is to suspend or expel the student, the sanction takes effect from the onset of the vice president's interim suspension.

11.7 In the event a lesser sanction is imposed, the interim suspension will not become part of the permanent record.

12. Counseling Referrals

The assistant dean may refer any student who exhibits behavior that interferes with the student's normal functioning to the Counseling and Testing Center.

The Counseling and Testing Center may, with written permission of the student, discuss the results of the referral with the assistant dean.

The student may refuse to submit to a conference without penalty at which time the disciplinary process will continue as if no referral were made.

13. Reporting at the Request of Dean of Students

A request to meet with the dean of students or designate shall be heeded by the students at the time and place set and shall have priority over other duties unless arrangements are made because of extraordinary circumstances.

14. University Hearing Board Appearances

The chair of the University Hearing Board shall have the authority to require a student to appear before the court at a designated time and place when the student's presence is necessary to resolve a question which is before the court. The chair shall have the authority to require the student to produce such items as are relevant to the adjudication.

15. Official Withdrawal from the University of Houston

15.1 The Dean of Students Office may place a disciplinary hold on the records of any student who withdraws prior to the resolution of pending disciplinary action.

15.2 The assistant dean may also place a notation on the student's official transcript indicating "disciplinary proceedings are pending at the University of Houston."

16. Appeals

16.1 Respondents may appeal the decision of the assistant dean by filing a written notice, a detailed explanation of the reason for the appeal, with the dean of students within five class days from the date of the receipt of the letter notifying the respondent of the sanction.

16.2 The dean of students will render a decision and notify the respondent in writing within ten class days of receipt of the appeal.

16.3 The decision of the dean of students shall be final. However, the dean of students may refer the appeal to the vice president for student affairs.

17. Conduct of Student Organizations

Student groups and organizations may be charged with violations of this Disciplinary Code. A student group or organization and its officers may be held collectively and/or individually responsible when violations of this code occur either during an event sponsored by the organization or by an individual representing or associated with that organization or group.

Sanctions for group or organization misconduct may include revocation or denial of registration or recognition in addition to all appropriate sanctions provided herein.

Student groups and organizations may appeal the sanction to the dean of students.

See section in this *Handbook* on Organizations Policy for more information.

18. Status of Students Suspended for Disciplinary Reasons

Students under disciplinary suspension are required to disassociate themselves from the university except for appointments that have been made to conduct official university business approved in advance by the dean of students or designate.

Princeton University
Rights, Rules, Responsibilities, 1990 Edition

University Discipline

The Faculty-Student Committee on Discipline (Undergraduate)

Powers. The Committee on Discipline, comprising students, faculty members, and administrators, is responsible for the administration of the stated rules and regulations governing undergraduate conduct, for assessing reported violations, and, when necessary, for assigning and recommending appropriate penalties.

Membership. The committee consists of five student members selected by the Undergraduate Student Government, four elected members of the faculty, the Dean of the College, who sits with the committee without vote, the Dean of Students, who serves as chairman and votes only in the event of a tie as set forth below, an Associate or Assistant Dean of the College, and an Associate Dean of Students, who serves as secretary without vote. An Assistant Dean of Students may serve as secretary in the absence of the Associate Dean. A quorum consists of at least three student members, at least two faculty members, and either the Dean of Students or the Dean (or Associate or Assistant Dean) of the College, who shall have the duties and powers of the Dean of Students in his or her absence.

General Procedures. If a student is alleged to have committed a minor infraction for which precedents are available and for which the penalty will not interrupt the student's academic career, he or she is first asked to meet with the appropriate Director of Studies (if the student lives in a residential college) or with the Dean or an Associate Dean of Students (if the student lives in one of the upperclass dormitories or off campus). The Associate Dean or the Director of Studies will investigate all complaints promptly. The facts of the case are discussed and the student is given ample time and opportunity to present his or her account of the incident in question. If the student lives in a residential college, the Director of Studies brings the case forward (with a recommendation for action) to the Residential College Disciplinary Board, composed of the five Directors of Studies, and the Associate Dean of Students. The Residential College Disciplinary Board determines the appropriate action, up to and including disciplinary probation. If the student lives in an upperclass dormitory or off campus, the Dean or the Associate Dean of Students takes the appropriate action (up to and including disciplinary probation). An Assistant Dean of Students may assist the Associate Dean in the investigation and resolution of any case.

A student has the right to appeal to the Dean of Students any decision of an Associate Dean. The deadline for filing such an appeal is one week from the date of the original decision. The student should understand that, in hearing the appeal, the Dean of Students is not bound in any way by the prior decision of the Associate Dean and that, after reviewing the facts, the Dean of Students may impose a greater or lesser penalty than that originally imposed by the Associate Dean.

A student has the right to appeal to the Committee on Discipline any decision of the Dean of Students or the Residential College Disciplinary Board. The deadline for filing such an appeal is one week from the date of the decision of the Dean of Students or the Residential College Disciplinary Board.

On appeal, the student receives a full hearing by the Committee on Discipline, in accordance with the procedures followed in cases referred directly to the committee for action. The student should understand that, in hearing the appeal, the Committee on Discipline is not bound in any way by the prior decision of the Dean or the Residential College Disciplinary Board and that, after reviewing the facts, the committee may impose a greater or lesser penalty than that originally imposed by the Dean or the Residential College Disciplinary Board. The Dean of the College or an Assistant or Associate Dean of the College will serve as chairman of the Committee on Discipline in the event of an appeal of a decision by the Dean of Students or the Residential College Disciplinary Board. In such circumstances, the Dean of Students sits with the committee, without vote.

All alleged academic infractions and any other potentially serious infraction for which the penalty might interrupt the student's academic career are referred directly to the Committee on Discipline. Other cases, judged to be minor, but for which no clear precedent exists, are also referred to the committee. In all cases referred to the committee, the student involved is informed in writing of the reason for being summoned and of the specific day and time when the student is to appear before the committee. The student may obtain from the Office of the Dean of Students reports of the alleged misconduct and the names of the members of the committee. Matters shall be presented to the committee with all reasonable promptness. Where a matter is first presented to the Office of the Dean of Students within one week of the end of an academic term, it may be held for consideration in the following term.

Disciplinary cases involving allegations of sexual harassment or assault by a student (undergraduate or graduate) that are not resolved by the Associate Dean of Students, the Assistant Dean of the Graduate School, or the Residential College Disciplinary Board will be adjudicated by a designated subcommittee of the Committee on Discipline, which will make recommendations concerning its findings and, if necessary, a penalty to the Dean of Students or to the Dean of the Graduate School. Appeals of the decision of the respective Deans to either the President or to the Judicial Committee of the CPUC will follow normal procedures governing the review of disciplinary decisions. A more detailed description of these procedures is available in the Office of the Dean of Students and in the Office of the Dean of the Graduate School.

Pending action on the charges by the committee or pending an appeal, the student may remain in residence on campus, attend classes, and make use of all University facilities, except for reasons relating to the student's physical or emotional safety or well-being, or for reasons relating to the safety of other members of the University community or of University property. The student should understand that, if the committee's decision proves adverse, or if an appeal proves unsuccessful, the decision of the committee will normally be considered effective as of the date of the original charge. If the final decision is a dismissal from the University (i.e., suspension, required withdrawal, or expulsion), the student will normally not earn credit for the semester in which the infraction occurred. If he or she has successfully completed course requirements while awaiting the final disposition of the matter, obtaining credit for the semester will be at the discretion of the Committee. Pending a hearing, or the student's decision about whether to appeal a dismissal from the University or the withholding of the degree and while an appeal is in process, the student's University transcript will bear the notation: "Status Under Review." Should the student decide not to appeal a dismissal or the withholding of the degree or should an appeal not result in an alteration of the committee's decision to dismiss the student or withhold his or her degree, the Registrar will record the fact of the penalty on the student's transcript.

Conduct of Hearings. The student may be accompanied at the committee hearing by an adviser, who must be a current member of the resident University community, and who may participate in the same manner as the student in the hearing. At the hearing any person with information about the matter before the committee may be requested to appear by the student, the Dean of Students, or the committee, subject to reasonable limits agreed on by the committee. A reasonable number of persons, all of whom normally must be current members of the resident University community, and whose only role is to provide information about the character and qualities of the student, may be permitted to appear at the hearing. The student has an opportunity to explain the circumstances from his or her point of view and may also question individuals who have provided information and may in turn be questioned by the committee members. After such questioning the student is given further opportunity to speak and is then excused while the committee deliberates and arrives at a decision by individual vote. In order to determine that a student has violated a University rule, a majority of the committee members present must conclude that the evidence presented constitutes a clear and persuasive case in support of the charges against the student. If the student is found to have misled the committee during the hearing, the committee may take that fact into account in reaching a conclusion and assigning a penalty.

The chairman or the secretary of the committee informs the student promptly of the decision. If a penalty is imposed, special effort is made in this discussion to ensure that the student fully understands why the penalty was imposed and its nature and consequences. The student has the right to receive a copy of the summary report of the proceedings.

There may be some occasions in which, because of external legal proceedings, the student believes that there are compelling reasons for refusing to speak or to answer questions. In the event that (1) legal proceedings—including but not limited to arrest, summons, and indictment—have been instituted or are anticipated against a student in state or federal courts as a result of his or her alleged involvement in the matters that the committee is investigating and (2) the alleged misconduct is more serious than a disorderly person offense, the student will be granted permission not to speak or to answer questions without prejudicing the committee's decision. In the case of other external proceedings, the committee will consider the student's reasons for declining to speak within the full context of its knowledge of the case before it, and if it deems these reasons legitimate it will excuse the student from giving information without prejudice to its disposition of the case. In instances as set forth above, when a student has chosen not to speak, and when the committee does not have enough information to come to a conclusion, at the discretion of the Dean the hearing may be postponed until more complete information is available. In such instances the Dean normally will suspend the student, pending disposition of the legal proceedings and recommencement of the hearing. Such suspension should be without prejudice. The committee must explain to the student the risks either of speaking freely or of not speaking at all.

If the voting members are evenly divided on a particular case, the case must be reconsidered at the next meeting of the committee. If at the second meeting at which the case is considered the regular voting members are still evenly divided, the Dean of Students votes to break the tie.

Appeals. A student has the right to appeal questions of procedural unfairness only to the Judicial Committee of the Council of the Princeton University Community, in accordance with the appeal procedures defined by the Judicial Committee.

Alternatively, a student may appeal to the President of the University. Such an appeal is chiefly an opportunity for the student to seek clemency by explaining special circumstances that might be taken into account with respect to the penalties imposed. The purpose of an appeal to the President is not to initiate a rehearing of substantive issues of fact or a new determination of whether a violation of rules has occurred.

The deadline for filing either such appeal is one week from the date of decision by the Committee on Discipline.

Records of Proceedings. Confidential records of all proceedings of the Committee and of the actions of the Residential College Disciplinary Board and the Deans are maintained in the offices of the Associate Dean. The use of these documents is restricted according to the rules and procedures concerning the confidential nature of student records.

Disciplinary procedures normally involve only the student and the University. Generally, the student's family is not informed while disciplinary procedures are under way. When, however, in the judgment of the University the welfare of the student or the community warrants communication, family members may be contacted during the disciplinary process. All disciplinary decisions resulting in serious penalties (especially, but not exclusively, withholding of degree, suspension, required withdrawal, and expulsion) will be communicated to the student's family or other legal guardian, unless the student has before the commencement of the term in question filed a statement certifying that he or she is not financially dependent as defined by the federal income tax laws.

Penalties. Penalties that may be applied by all University disciplinary bodies are set forth in the section on General Conduct, under "University Regulations," p. 16.

The Graduate School Judicial System

The Graduate School has no extensive formal code of disciplinary rules and normally relies on the continuing trust and good will of a community of scholars. As members of the University community, however, graduate students are bound by the rules and procedures described in the sections on "University Regulations" (pp. 16-30) and "The University and Public Law" (pp. 32-37). (All dormitory regulations are applicable to graduate students who reside in the Graduate College.) While the Honor System, as a specifically undergraduate institution, does not apply to graduate students, all forms of academic fraud as defined above (p. 47)–specifically, plagiarism, multiple submission, false citation, and the use of false data–are regarded as violations and are subject to disciplinary action.

Charges concerning academic fraud should not be handled informally or at the departmental level but must be brought as soon as possible, as a complaint either by a graduate student or against a graduate student, to the attention of the Dean of the Graduate School.

Graduate Student Grievances. The Office of the Dean of the Graduate School normally handles in the first instance all grievances of graduate students as well as complaints against graduate students. This applies also to graduate students serving in the capacity of Assistants in Instruction or Assistants in Research. In the case of unenrolled students whose degree candidacy continues, these procedures are valid in the appropriate cases for a period of five years past the date of the General Examination, notably when academic fraud is involved, but also in cases concerning personal conduct under "University Regulations" if such students are resident in Princeton.

A graduate student with a grievance concerning academic matters (excluding academic fraud, as defined above) should first attempt to resolve the grievance at the departmental level through discussions with the faculty member(s) concerned and/or the department chair and director of graduate studies. If the student feels that a satisfactory resolution has not been found, he or she should turn to the Associate Dean of the Graduate School for Academic Affairs for further advice. If a satisfactory resolution still can not be found through informal consultation, the student may request adjudication by the Dean of the Graduate School, who will render a decision as expeditiously as possible, normally in consultation with, or upon the advice of, the appropriate subcommittee of the Faculty Committee on the Graduate School (the Subcommittee on Policy or the Subcommittee on Student Life and Discipline).

A graduate student with a grievance concerning a non-academic matter should turn to the Assistant Dean of the Graduate School for Student Affairs. If the grievance concerns sexual harassment or assault (as defined on pp. 18-19 of this booklet), the Assistant Dean will follow the procedures described in the relevant section of this booklet (p. 75). In other cases the Assistant Dean will first attempt to resolve the grievance through informal consultation. If a satisfactory resolution cannot be found by these means, the student may request adjudication by the Dean of the Graduate School, who will render a decision, normally in consultation with, or upon the advice of, the Subcommittee on Student Life and Discipline of the Faculty Committee on the Graduate School.

Disciplinary Procedures. When the Office of the Graduate School has been informed of charges against a graduate student, whether academic or nonacademic, the student is immediately notified by the appropriate Assistant or Associate Dean of the impending investigation. The student is provided with a written statement concerning the charges as well as a copy of the procedures governing the investigation and the range of possible penalties (as set forth in *Rights, Rules, Responsibilities*, pp. 16-17). At this time the student is invited to submit a written response to the charges.

Alleged infractions judged to be of a minor nature, for which precedents exist and for which penalties will not interrupt the student's academic career, are normally investigated and resolved by the Assistant Dean for Student Affairs. If the student is not satisfied with the finding, he or she may appeal the decision to the Dean of the Graduate School.

Alleged serious violations of University rules and regulations may (according to *Rights, Rules, Responsibilities*, p. 62) be brought directly to the Judicial Committee of the CPUC. Normally, however, discipline cases are referred in the first instance to the Graduate School. In such cases the Dean is advised, in accordance with *Rules and Procedures of the Faculty* (1986; pp. 40-41), by the Subcommittee on Student Life and Discipline. The Subcommittee consists of the Dean of the Graduate School, *ex officio*, as chairman, the Assistant Dean for Student Affairs of the Graduate School as secretary (both without vote), and four members of the Graduate School Faculty Committee appointed yearly by the Dean, one from each division of the

University (with a quorum of at least three). The Subcommittee may be enlarged, at the student's request, by four graduate students, selected at random, who have equal votes with the faculty members of the Subcommittee.

In general, the procedures of the Subcommittee are analogous to the "General Procedures" of the Judicial Committee of the CPUC (as described in *Rights, Rules, Responsibilities,* pp. 62-63). It should be noted, however, that the Subcommittee always meets in closed session. Moreover, since cases vary widely, their disposition will inevitably depend upon the nature of the alleged infraction. For instance, since cases often involve students who are not presently, or no longer, in residence, the student's presence at the proceedings is not an absolute requirement as long as the student has personally received adequate notification and been given reasonable opportunity to submit a written response to the charges. (In such cases students who are unable to be present may, at their request, be represented by an adviser who is a current member of the resident University community, and who may participate in the same manner as the student in the hearing. The Subcommittee does not deal with outside counsel.) The nature of the evidence, as well as the pursuit of the inquiry, will inevitably depend upon the nature of the alleged infraction. However, the student always has the right to appear before the Subcommittee with or without an adviser as defined above. In every case the Subcommittee proceeds with an appropriate regard for fair process, deliberate speed, and satisfactory records. In order to find that a student has violated a University rule, the Subcommittee must be persuaded that the charges against the student are supported by clear and persuasive evidence.

Following its investigation the Subcommittee presents its advice in the form of a recommendation to the Dean, who observing fair process and deliberate speed, normally accepts it (but is not bound to do so). The student is notified by the Dean in writing of the Subcommittee's recommendation and the Dean's action, and is also informed of his or her rights of appeal and the appropriate procedures. A copy of the action is placed in the student's confidential file, which is maintained in the office of the Assistant Dean of Student Affairs (as distinct from the academic file that is maintained in the office of the Associate Dean for Academic Affairs).

Penalties. The range of possible penalties embraces the seven penalties specified above (pp. 16-17) under "University Regulations" and may also include, in cases involving students who have already left the University, revocation of the degree. Should the recommended penalty interrupt the student's academic career (suspension or required withdrawal), the Dean of the Graduate School will consult with the student's department before reaching a final decision.

Pending action on the charges by the Subcommittee or pending an appeal, the student may remain in residence on campus, attend classes, and makes use of all University facilities, except for reasons relating to the student's physical or emotional safety or well-being, or for reasons relating to the safety of other members of the University community or University property. The student should understand that, if an appeal proves unsuccessful, the Dean's decision will normally be considered effective as of the date of the original charge. Should the student decide not to appeal a dismissal or the withholding or revocation of the degree or should an appeal not result in an alteration of the Subcommittee's recommendation, and the Dean's decision, to dismiss the student or withhold or revoke his or her degree, the Registrar will record the fact of the penalty on the student's transcript.

Appeals. Any student wishing to appeal decisions of the Dean of the Graduate

School on academic matters should notify the Dean of the Faculty in writing to that effect, specifying the grounds of his or her appeal, not later than one week during which the University is in session after receipt of the written notice of the decision which the student wishes to appeal. The Dean of the Faculty shall transmit the student's written statement and any other relevant material directly to the Advisory Committee on Policy and report the transmittal to the faculty at its next meeting. The Advisory Committee on Policy shall determine whether or not the grounds of appeal are sufficient to warrant a hearing. If it decides that they are, the Advisory Committee may appoint a special panel to consider the individual case and make a report with recommendations to the Advisory Committee, or it may itself hear the appeal. In all cases, the decision of the Advisory Committee shall be final.

Any student wishing to appeal decisions of the Dean of the Graduate School on non-academic matters should do so through the Judicial Committee of the CPUC, which hears and decides appeals from persons found guilty of violations of rules of conduct, when such persons have alleged that the proceedings against them have not been fair and reasonable. The student wishing to have a judgement against him or her reviewed shall, within one week (during which the University is in session) of the original judgment, file a request for a review with the secretary of the CPUC, stating the authority that made the judgment and the date, and indicating his or her reasons for requesting a review. The secretary will immediately forward the request to the chairman of the Judicial Committee. The committee will meet in closed session and decide whether there are sufficient grounds to hold a formal hearing. If the committee decides that a reasonable doubt exists that the original proceedings were fair and reasonable, a formal hearing will be conducted. The committee may decide to uphold the previous judgment, to reverse or alter the previous judgment, or to return the case to the earlier hearing authority. The ruling of the earlier authority will be upheld unless convincing argument is presented to the contrary. Finally, the President of the University may review decisions of the Judicial Committee, and may reduce any penalties imposed but may not increase them.

The Judicial Committee of the Council of the Princeton University Community

Powers and Membership. The Council's Judicial Committee hears and decides, either in the first instance or on referral from one of the other judicial bodies, cases that involve alleged violations of those established rules and regulations whose violation constitutes a serious infringement of the recognized rights of members of the University community, a serious offense against the University's mission, a threat to the ability of the University to carry on its essential operations, or a substantial impairment of the common and legitimate interests of the University. The committee also hears and decides appeals from persons found guilty of violations of rules by other judicial bodies, when such persons have claimed that the proceedings against them have not been fair and reasonable. The committee's members include three members of the faculty, two undergraduate students, one graduate student, one member from one of the other groups represented on the Council, and a chairman who does not vote except in the case of a tie. The nature and structure of the Judicial Committee ensures that members of the University community, if they stand accused of the same offense and if it is a serious one, will have their cases decided in accordance with the same interpretation of the rules involved. Under previous arrangements, cases of alleged offenses by undergraduates, graduate students, faculty members, and staff members were heard by different judicial bodies, and there was no mechanism to prevent the different judicial bodies from putting quite different constructions on the same rule.

Special judicial bodies and special procedures do, however, remain in existence and continue to deal with alleged violations of rules which apply only or mainly to some particular group within the University (e.g., rules governing students, faculty, staff, proctors, or administrators). Acts which are an exercise of a function unique to such a particular group are not subject to the jurisdiction of the Judicial Committee so long as it would have been reasonable for a person in the circumstances to have believed that his or her acts were properly within the scope of his or her particular function. Such acts may, however, fall under the jurisdiction of the rule-applying body or office of the particular group.

General Procedures.

1. The procedures of the Judicial Committee, which are outlined below, are designed to enable the committee to fulfill its charge, and to guarantee to each person charged the following rights in the interest of ensuring procedural fairness:

a) To receive in writing in advance of a formal hearing a statement of the charges against him or her, together with a list of the witnesses and of the material evidence which the person bringing charges intends to make available to the Judicial Committee.

b) To testify if he or she desires and to answer questions if he or she desires without prejudice for failure to testify or answer questions.

c) To supply to the committee material evidence and a reasonable number of witnesses to be called in his or her own defense.

d) To question all witnesses called by the committee, and to challenge the evidence.

e) To have an adviser of his or her choice from the resident members of the University community at any hearing, open or closed, who may speak on his or her behalf.

f) To receive upon request a record of the proceedings at the hearing. The procedures of the committee also ensure that all persons involved in judicial hearings have the right to orderly procedures.

Any individual involved in proceedings is entitled to be protected from harassment, or fear of harassment, by other participants or by observers. In addition, the University community is entitled to have the triers of fact protected from the influence of threats, harassment, or unruly mob behavior.

2. The procedures of the Judicial Committee were formulated after consideration of a multitude of matters, among them the nature of this University community, the role of the Judicial Committee in the community, procedures of other organizations in and out of this University which have related interests, procedures in courts of law, procedures in congressional and other legislative hearings, the needs, the interest, and the welfare of the individuals who form this community, and the experience of the committee in its first year of existence. Some aspects of the procedures are investigative, others are deliberative. They provide the Judicial Committee the opportunity

a) to ascertain the facts surrounding an alleged violation of University regulations;

b) to explore issues related to such charges, in order to determine possible mitigating circumstances which should be taken into account in the levying of the penalties, if any.

They aim therefore to facilitate the disposition of matters brought to the Judicial

Committee with the greatest degree of justice and fairness for all concerned. The committee assumes that all members of the Princeton University community participating in proceedings will observe generally accepted principles of honesty and fair play.

Procedure in Cases Not Previously Heard by Another Authority.

1. *Charges.*

a) Persons wishing to place a case before the committee shall file a complaint with the secretary of the Council of the Princeton University Community within a reasonable time, stating the nature and circumstances of the alleged violation of University regulations.

b) The secretary will immediately forward the complaint to the chairman of the committee, who will make a preliminary determination of jurisdiction, subject to review by the full committee. The chairman may refer the case to another authority or agree to put the case before the committee.

c) If the case is to come before the committee, the chairman will obtain from the person making the complaint a formal statement of the charges being made against a specific person or persons, identifying the University regulation or regulations alleged to have been violated, together with an outline of the case to be presented.

2. *Notification.* Upon receipt of this information the chairman will immediately send a copy of the information described in the paragraph above to each person so charged, informing him or her of the date and place of a pre-hearing conference, to be held within one week of the date of the notification.

3. *Pre-hearing conference.* The purposes of the pre-hearing conference are the following:

a) To give the committee sufficient information for it to determine whether or not a hearing is necessary to determine the facts. If the matter of jurisdiction is at issue, and if a hearing is necessary, the determination of jurisdiction will be the first order of business in the hearing.

b) To make sure that the persons charged fully understand their rights, the charges against them, and the nature of the supporting evidence.

c) To clarify for all parties the procedures to be followed by the committee in hearing and deciding upon a case.

d) To determine whether the persons charged wish to request an administrative determination on the charge. Persons against whom charges have been made may request, and at its discretion the committee may approve, an administrative disposition of the case by an appropriate officer of the University. Under these circumstances the persons charged must sign a statement indicating that they understand the charges against them and their right to a hearing before the Judicial Committee, but that they waive this right and the right to an appeal to the committee. The administrative officer will dispose of the case, sending to the persons charged and to the committee a record of the disposition of the case. Administrative disposition of a charge in no way denies the right of an appeal to the President of the University.

e) To determine whether the persons charged desire an open or a closed hearing and to discuss the scheduling of the hearing.

f) To determine whether any member of the committee chooses not to hear this case because the member finds that he or she cannot in good conscience apply established rules and standards in this case (Charter, 5.7.3). The pre-hearing conference will be closed. It will be attended by the committee and its staff, the persons charged or their representative, the persons bringing charges or their representative, and any other persons invited by the committee. Each party to the case may be accompanied by an adviser from within the University community. If after proper notice the persons charged do not appear, the committee will proceed to make its own determination in the case. At least three members of the committee shall be present. After the pre-hearing conference, the committee will meet privately to determine on the basis of what it has heard whether a hearing is required under Section 5.7.1 of the Charter of the Council of the Princeton University Community and to set a date for the hearing. Parties to the case will then be informed of the decision of the committee. If the case is to be heard, the committee will obtain from all parties involved:

1. a list of the witnesses prepared to give testimony if called by the committee, with an indication of the relevance of the testimony of each to the charges being made;
2. a description of the material evidence available to the committee, with an indication of its relevance.

The committee will distribute to all parties involved a list of all witnesses and material evidence to be presented.

4. *Hearings.* Hearings will be closed unless the persons being charged request an open hearing. At any point during an open hearing, the persons charged may request permission to close the hearing. The committee will rule on any such requests. In exceptional circumstances, the committee reserves the right to hold a portion of the hearing in closed session.

a) At a closed hearing only the persons bringing charges and their advisers, the persons being charged and their advisers, witnesses called by the committee, members of the committee, and the committee staff may be present. The names of the persons charged will not be released by the committee, and the records of the case will be considered confidential.

b) At an open hearing, in addition to the persons mentioned in the paragraph above, spectators from the University community may be admitted up to the normal seating capacity of the room. Open hearings will be held in the Peyton Hall lecture room or a room of approximately equivalent size. The campus radio may be given permission to broadcast the hearing under conditions approved by the committee, or arrangements may be made for the broadcast of the hearing in an additional auditorium if there is sufficient public interest to justify these arrangements.

c) The chairman of the Judicial Committee is responsible for maintaining conditions which are consistent with the orderly conduct of hearings. In carrying out this responsibility, the chairman is obligated to prevent and deter hostile, threatening, or unduly disrespectful remarks or behavior by any individuals present and also to prevent and deter prolonged or emphatic audience response to testimony or argument. In meeting this obligation, the chairman may take such steps as are outlined under "Responsibilities of the Chairman," paragraph 3, p. 68.

d) The committee will call a reasonable number of witnesses requested by the persons bringing charges and the persons being charged. Normally, these witnesses will be called from lists provided before the opening of the hearing by the persons involved and made available to both parties, but the committee may call any witnesses it pleases. Normally, witnesses shall not be present at the hearing until they present their testimony.

e) The committee may permit additions to lists of witnesses or evidence when it is convinced that the availability or relevance of such witnesses or evidence could not have been foreseen before the hearing began. Advance notice of such additions shall always be given to all parties, and the committee shall allow such delay as it may consider necessary to prepare for the questioning of added witnesses or the examination of added exhibits.

f) All witnesses may be questioned by all parties in a case and their advisers and by any member of the committee. The chairman may rule any question out of order.

g) All material evidence and documents shall be formally introduced as presented in the hearing, lists of the exhibits proposed for presentation as evidence and copies of documentary evidence having been made available in advance to all parties in a case. The committee may introduce additional materials during the course of the hearing.

h) The credibility of any evidence which is introduced may be challenged by any parties in a case.

i) The judgment of the committee shall be based entirely upon testimony and evidence presented formally during the course of the hearing. The persons charged shall be presumed innocent until the committee is convinced beyond a reasonable doubt by the evidence presented during the hearing that they are guilty. In determining their guilt or innocence the committee will disregard any previous history of disciplinary action with respect to the persons charged. If the persons charged are found guilty, the committee may, in determining a penalty, take into account any previous disciplinary action.

j) The persons charged and the persons bringing charges may be questioned by the members of the committee and by the other parties in the case. The persons charged may decline to answer questions without prejudice.

k) A verbatim record of the hearing shall be made and kept under the supervision of the secretary of the committee. This record shall be supplied to the persons being charged and the persons bringing charges upon request.

5. *Judgment.*

a) After the parties in the case have had a reasonable opportunity to present their arguments and to question opposing witnesses, and the committee has completed its questioning, the committee shall meet in private to reach a decision and, if it finds the charges to have been sustained, to assign an appropriate penalty.

b) Five members, not including the chairman, shall constitute a quorum. All decisions shall be made by a majority of those present.

c) When the committee has reached its decision, the chairman will notify the parties and then those authorities mentioned in Section 5.7.6 of the Charter of the Council of the Princeton University Community and the press of the committee's disposition of the case. The committee's report will include the result of its vote and a majority opinion, together with minority opinions, if any. If the hearing has been closed, the committee in making its public report will be guided by the principles concerning the confidential nature of student records.

Procedure in Appeals of Cases Previously Heard by Another Authority.

1. According to the Charter of the Council, the Judicial Committee may also decide to hear appeals from persons found guilty of violating established rules and regulations, when it has been alleged by such persons that the proceedings against them have not been fair and reasonable.

a) The person wishing to have a judgment against him or her reviewed shall, within one week (during which the University is in session) of the original judgment, file a request for review with the secretary of the Council, stating the authority that made the judgment and the date, and indicating the reasons for requesting a review.

b) The secretary will immediately forward the request to the chairman of the committee.

c) The chairman will immediately notify the original authority that the request for review has been made and will as promptly as possible obtain from the authority that made the earlier judgment the record of the proceedings in the case. A copy of this record will be furnished by the committee to the person making the request.

d) The person making the request will file with the chairman of the Judicial Committee within one week of receiving the record a memorandum stating in what specific respects he or she alleges that the procedures or the determination of the penalty against him or her have not been fair and reasonable. In preparing this memorandum, the person requesting review has the right to seek any advice he or she chooses.

2. *Preliminary determination.* The committee will meet in closed session and decide on the basis of the appeal memorandum whether there are sufficient grounds to hold a formal hearing. It may at its discretion call the person making the appeal for questioning in closed session, but if it does, the authority which made the original judgment shall be invited to have a representative present, who may participate in the questioning. Note that the only grounds for appeal are that the original proceedings "have not been fair and reasonable."

3. *Hearing.* If the committee decides that a reasonable doubt exists that the original proceedings were fair and reasonable, a formal hearing will be conducted, the procedures being analogous to those outlined under 4 and 5, pp. 65–66.

4. *Judgment.* The judgment will be given according to the same procedures as in 5, p. 66. The committee may decide to uphold the previous judgment, to reverse or alter the previous judgment, or to return the case to the earlier hearing authority. The ruling of the earlier authority will be upheld unless convincing argument is presented to the contrary.

Responsibilities of the Chairman.

1. The chairman of the Judicial Committee shall preside at all hearings. If the chairman must be absent during part of a hearing, he or she may designate another member of the committee to act in the chairman's place as deputy chairman for the period he or she is absent. If, in extraordinary circumstances, an entire hearing must be conducted in the absence of the chairman, the committee shall elect a chairman *pro tem* from among its members by a majority vote, selecting a person from the alternate panel to replace him or her as a regular voting member so long as the chairman shall be absent.

2. The chairman, as presiding officer, is responsible for procedural correctness.

The chairman

a) makes an initial determination of any procedural question which arises during the course of a hearing;

b) rules on the propriety of any questions asked by members of the committee, persons charged, or persons bringing charges.

3. The chairman is responsible for maintaining conditions which are consistent with the right to orderly conduct of hearings as described in 4c, p. 65. When persons attending the hearings as observers engage in acts which violate this right, the chairman may, after due warning, require the withdrawal of such persons from the hearing room. The chairman may also, after due warning, adjourn the hearing and reconvene, barring all observers except members of the press. The chairman may also initiate, on consultation with the committee, charges against observers who are disrupting the hearing.

In cases where the violation of this right stems from acts of persons charged or persons bringing the charges, the committee shall normally adjourn the case and begin hearings within 48 hours on the charge of violating the rights to an orderly hearing. If such persons persist in their disruptive actions, the committee may, after due warning in exceptional instances, continue these proceedings in their absence.

a) Any decision of the chairman may be challenged by a member of the Judicial Committee. The committee will meet, if necessary, in executive session to consider the decision and vote on it. A majority of the committee is required to reverse the chairman's decision.

b) In hearing cases involving the violation of the right to orderly hearings, the committee shall normally restrict itself to hearing arguments concerning mitigating circumstances involved in the alleged violation. The committee shall then meet to discuss the case and to decide upon appropriate penalties, if any, by majority vote. Penalized individuals wishing to appeal such decisions must address their appeals to the President of the University.

4. The chairman shall have no vote in decisions related to the adjudication of charges or the conduct of hearings except to resolve a tie.

Order of Proceedings in Cases of the First Instance.

1. The chairman shall first call upon the persons bringing charges or their representatives to outline the substantive basis of the charges. They may introduce additional material evidence at this time.

2. Members of the committee may then question persons bringing charges.

3. The chairman of the committee shall then call upon persons charged to outline their case.

4. Members of the committee may then question the persons charged.

5. Witnesses will then be called by the committee in an order to be determined by the chairman.

a) Witnesses normally will first be questioned by members of the committee, then by the persons bringing charges, and, finally, by the persons charged. Each group may, in the same order, then requestion each witness and the members of the committee may ask final questions of witnesses before they are dismissed. (Since all witnesses are called by the committee in order to facilitate its investigation and adjudication of charges, there are no friendly or hostile witnesses, and cross-examination, redirect examination, and re-cross-examination procedures are not germane.)

b) Witnesses will normally not be present before giving their testimony. After they have been questioned, they may remain at an open hearing and may be called for further questioning by the committee.

c) Persons charged and persons bringing charges will always have an opportunity to speak in direct rebuttal of evidence or the testimony of witnesses when it is their turn to address themselves to the committee.

d) In asking questions of witnesses, persons bringing charges and persons charged may address themselves to the substantive basis and validity of testimony. The committee will make every effort to protect each witness from undue harassment during a hearing.

6. After all witnesses have been called, persons bringing charges and persons charged may question the evidence and documents and raise additional questions. These parties may address their questions directly to one another, unless the chairman rules otherwise.

7. Members of the committee may at any time question the persons bringing charges and the persons charged. The latter may decline to answer without prejudice.

8. The chairman shall then call upon the persons bringing charges and the persons charged to summarize their positions and to make concluding remarks.

9. At the completion of concluding remarks, the chairman may make summary remarks on behalf of the committee and shall close the hearing. The committee shall then meet in executive session in order to make its judgment and to impose penalties, if any.

Order of Proceedings in Appeals Cases. The order of proceedings in appeals cases is the same as that in cases of the first instance, except that persons making an appeal present their case first and representatives of the body having made the original decision second.

Procedural Requests.

1. The parties to a case may request a ruling by the charman concerning procedural correctness at any time during the hearing

2. The parties to a case may request that the committee add witnesses to be called before it or that the committee call witnesses in a specified order.

3. At any point during an open hearing, the persons charged may request permission to close the hearing. The committee will rule on any such requests.

4. Any member of the committee may request a recess of the hearing so that the committee can meet in executive session at any time during the hearing.

Evidence.

1. Normally, evidence accepted by both parties at a pre-hearing conference will be labeled before the hearing opens.

2. Other evidence, not accepted by one party, may be introduced and challenged during the hearing. After arguments are given, the chairman shall make a ruling on the issue of its admissibility.

3. Photographic evidence introduced:

a) Persons who took photographs used as evidence are subject to questioning by the committee and both parties to a case as to the circumstances under which the photographs were taken.

b) Witnesses who used photographs for purposes of identification prior to the hearing are subject to questioning as to how such photographs were used.

All documentary evidence will be retained in the permanent records of the committee.

Reports.

1. In accordance with Section 5.7.6 of the Charter of the Council of the Princeton University Community, the Judicial Committee shall submit a written report on the disposition of each case.

2. This report shall include:

a) a chronology of the case from the receipt of charges to final disposition;

b) a statement of actions taken by the committee pertaining to the case;

c) a statement of the findings which were significant and relevant to the disposition of the case and the selection of any penalties; and

d) remarks on procedural questions raised during the hearing.

Appeals from Decisions of the Judicial Committee. In accordance with the Charter of the CPUC (5.7.5), the President of the University may review decisions of the Judicial Committee, and may reduce any penalties imposed but may not increase them. It has been the policy of each President during the time of the existence of the Council, and it is correct in the view of the Committee on Rights and Rules, to regard an appeal to the President chiefly as an opportunity for an individual to seek clemency by explaining special circumstances that might be taken into account with respect to penalties imposed upon him or her. The purpose of an appeal to the President is not to initiate a rehearing of substantive issues of fact or a new determination of innocence or guilt.

Appeals will not normally be considered unless lodged with the President within one week after the Judicial committee's decision, unless otherwise specified in the decision.

As revised February 15, 1971; March 29, 1971; April 9, 1971; December 12, 1972; and March 27, 1973.

II. SELECTED CODES AND POLICIES -- ACADEMIC

University of Wisconsin

ACADEMIC MISCONDUCT RULES AND PROCEDURES

ACADEMIC MISCONDUCT

Cheating (academic misconduct) may be a distasteful subject to consider. And yet, part of the value of your degree from the University of Wisconsin–Madison lies in the standards of academic honesty and integrity maintained by the campus.

As a UW–Madison student, you have the right to expect that you and other students will be graded fairly, and you have rights of due process should you be accused of misconduct. You also have an obligation to conduct your academic work according to University standards. Therefore, it is important that you:

BECOME FAMILIAR with the rules of academic misconduct.

ASK YOUR INSTRUCTOR if you are unsure whether something is acceptable (for example, how to use sources in a paper or whether to work with another student on an assignment).

LET YOUR INSTRUCTORS KNOW if you think you see incidents of misconduct.

BE AWARE that helping someone else to cheat is a violation of the rules. Consider what you would do if a good friend asked you for illegal help.

This brochure contains a summary of the UW–Madison academic misconduct rules and procedures. If you have questions, call the Office of the Dean of Students at 263–5700.

DEFINITIONS

Academic integrity means that any work handed in is solely the work of the student whose name is on it and that it truthfully represents work done. Chapter 14 of the University of Wisconsin Administrative Code defines academic misconduct as follows:

UWS 14.03 ACADEMIC MISCONDUCT SUBJECT TO DISCIPLINARY ACTION

(1) Academic misconduct is an act in which a student:

(a) seeks to claim credit for the work or efforts of another without authorization or citation;

(b) uses unauthorized materials or fabricated data in any academic exercise;

(c) forges or falsifies academic documents or records;

(d) intentionally impedes or damages the academic work of others;

(e) engages in conduct aimed at making false representation of a student's academic performance; or

(f) assists other students in any of these acts.

(2) Examples of academic misconduct include, but are not limited to: cheating on an examination; collaborating with others in work to be presented, contrary to the stated rules of the course; submitting a paper or assignment as one's own work when a part or all of the paper or assignment is the work of another; submitting a paper or assignment that contains ideas or research of others without appropriately identifying the sources of those ideas; stealing examinations or course materials; submitting, if contrary to the rules of a course, work previously presented in another course; tampering with the laboratory experiment or computer program of another student; knowingly and intentionally assisting another student in any of the above, including assistance in an arrangement whereby any work, classroom performance, examination or other activity is submitted or performed by a person other than the student under whose name the work is submitted or performed.

SOME SPECIAL POINTS ABOUT . . .

COLLABORATION

You will note that the examples state that collaboration with others on work to be presented is a violation only if it is "contrary to the stated rules of the course." You should be aware that different instructors have different expectations about working with others.

Be sure you know your instructor's position on this. If you wish to consult with or work with another student on an assignment and you are not sure of the course rules, ask the instructor.

PLAGIARISM

Plagiarism means presenting the words or ideas of others without giving credit. You should know the principles of plagiarism and the correct rules for citing sources. In general, if your paper implies that you are the originator of words or ideas, they must in fact be your own.

If you use someone else's exact words, they should be enclosed in quotation marks with the exact source listed. You may put someone else's idea in your own words as long as you indicate whose idea it was (for example, "As Jane Smith points out, . . .").

If you are unsure about the proper ways to give credit to sources, ask your instructor or consult the Writing Lab at 6171 Helen C. White Hall.

ADVICE AND ASSISTANCE

If you are accused of misconduct, you will probably have questions and concerns about the process. If so, you should feel free to call the Office of the Dean of Students. Although that office plays an important role in administering the misconduct codes, staff members are also available for advice and consultation.

IF YOU ARE ACCUSED OF CHEATING

If it appears to an instructor that you might be involved in an incident of academic misconduct—for example, cheating on an exam, plagiarizing a paper, or interfering with another student's lab work—you must be offered a chance to meet with the instructor.* At this meeting the instructor will review the evidence, and you will have an opportunity to respond.

If the instructor is persuaded that you have not been involved, that no misconduct has occurred, or that no action is warranted, that will be the end of the matter.

On the other hand, the instructor might conclude that academic misconduct has occurred. The instructor may then decide on one or more of the following penalties. These are ranked in order of severity, and each group has somewhat different procedures.

PENALTIES

Chapter 14 lists penalties as "a" through "j." They are grouped by degree of severity and procedural process as follows:

GROUP A

a) An oral reprimand

b) A written reprimand presented only to the student

c) An assignment to repeat the work to be graded on its merits

GROUP B

d) A lower or failing grade on the particular assignment or test

e) A lower grade in the course

f) A failing grade in the course

g) Removal of the student from the course in progress

h) A written reprimand to be included in the student's disciplinary file

GROUP C

i) University disciplinary probation

j) Suspension or expulsion from the University

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* If you are not enrolled in the class involved, the instructor must refer the matter to an Investigating Officer.

PROCEDURES

GROUP A

The instructor may decide on a reprimand, oral or written, and/or ask you to repeat the work affected by the misconduct. If the instructor chooses to have you repeat the work, s/he must grade it on its merits, making no deduction for the previous misconduct. No permanent disciplinary record is made for penalties in this group. You do have the right to contest any penalty imposed, even these very mild ones (see hearing section), so you should keep some notes about the incident in case they are needed.

GROUP B

Penalties d-h require that the instructor prepare a written report, summarizing the reasons for the belief that misconduct has occurred, and proposing one or more appropriate sanctions. The instructor must send or give a copy of this report to you, along with a copy of the rules governing academic misconduct. Copies of the report will be sent to the Office of the Dean of Students and your Academic Dean's office. If you wish to appeal either the factual conclusions in the report or the proposed sanction, you must file a request for a hearing within 10 days; otherwise, the recommended sanction will be imposed.

GROUP C

If disciplinary probation, suspension or expulsion is recommended as a sanction, the instructor must refer the case to an Investigating Officer (usually in the Office of the Dean of Students). You will be notified that your case has been referred. The Investigating Officer will meet with you to hear your statements, examine the evidence, and prepare the written report. A hearing will be scheduled for these sanctions unless you formally waive your right to such a hearing.

RIGHT TO A HEARING

If you wish to contest a report of any misconduct, a hearing will be scheduled. You must request such a hearing for sanctions a through h within 10 days of the instructor's oral or written decision. Requests for hearings should be filed with the Office of the Dean of Students.

For sanctions i and j (probation, suspension or expulsion), a hearing will automatically be scheduled unless you waive your right to such a hearing in writing.

The hearing will be before the Academic Misconduct Review Committee which will include some student members. If the proposed sanction is suspension or expulsion, you may choose to have your case heard by the committee or an individual hearing examiner provided by the chancellor. At the hearing, the instructor will be asked to present information and you will be asked to present any statements you wish to make. You may be accompanied by a person of your choosing if you wish.

The committee or examiner will listen to the evidence and statements and then decide whether academic misconduct has occurred and what the sanction should be. The committee or examiner is not limited to the sanction recommended by the instructor. In cases in which the hearing committee or examiner prescribes the sanctions of suspension or expulsion, a further appeal to the chancellor is possible. In exceptional cases, the Board of Regents has the right to review the record further.

WHAT TO DO IF YOU SEE CHEATING OCCUR

Honest students are rightfully distressed when they see cheating occur. Often other students see behaviors which are not noticed by instructors. The integrity of the classroom is threatened, and grading curves may be affected.

You should feel free to discuss your concerns and observations with your instructor. S/he will want to know about it, whether it is to take action in a particular case or to take steps to prevent such cheating in the future. The instructor may ask you if you would be willing to testify at a hearing although you will not be forced to do so. If you still have concerns after talking with your instructor, you may consult with your Academic Dean or the Office of the Dean of Students.

You may help other students by warning them that what they are doing is in violation of the rules and that you might feel compelled to report it. Engage your friends in discussions of the tough questions like: What do you do if a friend offers to pay you to do a term paper in your area of expertise?

Cheating will remain a problem until all members of the University community—faculty, students, and staff—make clear and open their values on and commitment to academic honesty.

For a full text of Chapter 14, call the Office of the Dean of Students at 263-5700 or see the Student Information Handbook.

Prepared by the Student Conduct Policy Committee
and the Office of the Dean of Students

Spring 1989

117 Bascom Hall
University of Wisconsin-Madison
Madison, Wisconsin 53706

College of New Rochelle

Academic Code of Conduct: School of Arts and Sciences

Each school sets its own standards for conduct in the area of academics. The following Academic Code of Conduct applies to the School of Arts and Sciences:

The College of New Rochelle believes that its students should be responsible for setting, maintaining, and supporting moral and intellectual standards for themselves and others. Those standards are assumed to be ones which will reflect credit on the College, its students, and its guests.

Students are expected to conduct themselves in a manner consistent with the principles set forth in the following three statements.

A. Statement of Intellectual Responsibility Among Students at the College of New Rochelle

Preamble: Each person's education is the product of her own intellectual effort and participation in a process of critical exchange. The College can only educate those who are willing to submit their own work and ideas to critical assessment, and who do not interfere with the participation of others in the critical process. Therefore, the College considers it a violation of the requirements of intellectual responsibility to submit work that is not one's own or to subvert the conditions under which academic work is performed by oneself or by others.

Failure by a student to conduct herself in a manner consistent with the principles set forth above may in serious instances jeopardize the student's continued association with the College. The College reserves the right to exclude at any time students whose conduct or academic standing it regards as unsatisfactory; in such cases fees are not refunded or remitted in whole or in part, and neither the College nor any of its officers consider themselves to be under any liability whatsoever for such exclusion.

Article I Student Responsibility

Section 1. In undertaking studies in the School of Arts and Sciences at the College of New Rochelle every student agrees to abide by the above statement.

Section 2. As a condition of enrollment in this School, all incoming students shall sign enrollment forms attesting that they have read the Honor Pledge and understood its application to their academic conduct at the College.

Section 3. Orderly and honorable conduct of examinations is the individual and collective responsibility of the students concerned, in accordance with the above statement. Students are expected to sign the Honor Pledge at the start of each major examination, midterm, and final examination.

The Honor Pledge reads as follows:

"On my honor, I promise not to give or receive aid on this examination. I understand the consequences of my actions, in accordance with SAS policy regarding cheating and plagiarism."

Article II Faculty Responsibility

Section 1. Promotion of aims of the Statement of Intellectual Responsibility is a general responsibility of the faculty.

Section 2. Every member of the faculty has a specific responsibility to explain the implications of the statement for each of his or her own courses, including a specification of the statement for each of his or her own courses, and specifications of the conditions under which academic work in those courses is to be performed. This statement should be indicated clearly in each course syllabus.

Section 3. It is expected that class exams will be proctored, so that the instructor will be available to answer any questions that may arise.

Article III Procedure for Enforcement of Policy

Faculty policies with regard to intellectual dishonesty shall include the penalty to be imposed when cheating or plagiarism is discovered; penalties may include failure for a given assignment or failure in the course, in which case, a report shall be submitted to the academic dean. In the case of a second instance, students may be suspended from the College. In any allegation of intellectual dishonesty, every effort will be made to ensure justice; in all cases, educational assistance rather than adversary proceedings will be sought.

If, in conformity with this policy, a sanction is imposed, students may appeal first, to the professor who discovered evidence of the offense; second, to the department chair; and third, to the academic dean of the school involved. If, after exhausting this chain of appeal, students still believe the action taken to be unfair, they have the right to appeal to the College Judicial Board. Final appeal rests with the Senior Vice President for Academic Affairs.

If a student witnesses a violation of the Honor Code, she has two options: (1) she may choose to confront the violator herself, giving her the option to come forward, or (2) she may notify the professor involved of the violation. In either case, the procedure outlined above should be followed.

B. Statement on Freedom of Expression and Dissent

The College of New Rochelle prizes and defends freedom of speech and dissent. It affirms the right of teachers and students to teach and learn, free from coercive force and intimidation and subject only to the constraints of reasoned discourse and peaceful conduct. It also recognizes that such freedoms and rights entail responsibilities for one's actions. Thus the College assures and protects the rights of its members to express their views. The College considers disruption of classes (whether, for example, by the abridgment of free expression in a class or by obstructing access to books, course materials, or the place in which the class normally meets) or of other academic activity to be a serious offense that damages the integrity of an academic institution.

C. Statement on Respect for Persons

Respect for the rights, dignity, and integrity of others, as well as one's self is essential for the well-being of an academic community. Actions by any students which do not reflect such mutual respect are damaging to each of us and hence damaging to the College of New Rochelle.

The College Judicial Board shall have jurisdiction over all violations of College policy by a student of the School of Arts and Sciences, as stated in the *Student Handbook* and College Catalogue, and/or Student Code of Conduct of the College of New Rochelle.

Statement on Academic Integrity: School of Nursing

Cheating

The most common violations of academic integrity are cheating and plagiarism. Cheating is to act dishonestly during an examination for the purpose of taking or giving help on the examination. Examples of cheating include those listed below.

1. Using unauthorized books, papers, or notes during an examination.
2. Looking at another person's examination answer sheet or examination paper with any handwritten notations during the examination period.
3. Procuring, distributing, or using copies of examinations that have been fraudulently obtained.

Plagiarism

Plagiarism is the presentation of someone else's ideas, work, charts, tables, diagrams, etc. as if they were one's own by failing to cite the correct resources. In order to avoid plagiarizing, adhere to the following guidelines:

1. Statements taken verbatim from any source need to be identified as quoted materials. Any direct quotes must be in quotation marks and footnoted.
2. Reworded, summarized, or paraphrased material should also have the source identified through a footnote. (Changing a few words does not make the material presented your own.)
3. Do not misrepresent the source of any material by citing false references.

(Section 213-b of the New York State Education Law prohibits the sale of term papers, essays, and research reports to students enrolled in a college.)

A violation of academic integrity is a serious breach of the accepted values of the College of New Rochelle. When questions of a breach of academic integrity arise, students are entitled to the following:

1. to remain silent without assumption of guilt,
2. by the student's request,
    a. to receive any charges in writing from the instructor;
    b. to receive a copy of the Statement on Academic Integrity;
3. to be advised of the instructor's intended academic sanction. Such sanctions may include but are not limited to the following:
    a. a grade of F on the paper or examination; the student may be given the option of submitting a similar but additional project for grading, or taking another but additional examination for grading;
    b. a grade of F on the paper or examination but no option to submit additional work or take an additional examination;
    c. a grade of F for the course.

Should the instructor become convinced that the suspicions are unfounded, no action will be taken. If the suspicions are founded, and if the student and the instructor are both willing, they may agree upon a resolution. Subsequently, the charges and resolution must be reported to the Dean of the School of Nursing.

Appeals Process

The appeals process occurs in matters involving violations of academic integrity, mismanagement, or mistreatment about which you wish to lodge a formal complaint. In the School of Nursing the student may appeal first to the professor, second to the Program Chairperson, and third to the Assistant Dean. If after exhausting this appeal process, students still believe the matter is unresolved or the action unfair, they have the right to appeal to the Enrollment Management Committee of the School of Nursing which is charged with hearing academic appeals. Final appeal rests with the Dean of the School of Nursing and the Senior Vice President for Academic Affairs.

Adapted from Lehman College, CUNY, Statement on Academic Integrity

Clinical Behavior Policy for the School of Nursing

Student behavior which is detrimental to the welfare of patients, hospital staff, faculty, or fellow students within the clinical setting may lead to dismissal of the student from the clinical setting. This may result in the student being unable to successfully meet the course objectives, and, consequently, receiving a clinical failure. Students will not be permitted a make-up day if dismissed from the clinical setting by a faculty member.

Examples of detrimental behavior include, but are not limited to:

1. a lack of preparation,
2. fraud or fraudulence,
3. inappropriate and/or disruptive activities.

Standards for Written Work
School of Arts and Sciences and School of Nursing

In addition to the Academic Code of Conduct, students in the School of Arts and Sciences and the School of Nursing are bound by the following standards for written work. These standards should be followed for all written work submitted in all courses in your School. If your paper does not meet these standards, your instructor may ask you to rewrite it and/or may penalize you in grading the paper.

Tutors and staff are available at the Learning Support Services/ Writing Center if you need help in planning and developing your paper. You may also use the resources of the Center to identify and remedy deficiencies and ensure that your paper meets the standards outlined in this style sheet.

To assist you to meet standards, you should obtain the Harbrace College Handbook by Hodes and Whitten (current edition) and a standard dictionary. The School of Nursing uses the American Psychological Association format.

I. Correctness

Your paper should be written in complete sentences which are correctly punctuated. All words should be spelled accurately; if you are uncertain about the spelling of a word, you should look it up in the dictionary. Be sure to proofread your paper for errors before submitting it.

II. Clarity

Your paper should have a thesis, or main idea, which is clearly explained and fully illustrated. It should be divided into well-organized paragraphs, each of which develops a single thought. The paragraphs should be presented in an orderly progression according to the principles of logical organization. If your paper presents an argument, you must give sufficient evidence to support your points.

III. Documentation

You must footnote:

A. all direct quotations (with quotation marks and footnotes),

B. any borrowed map, chart, diagram,

C. all borrowed ideas, opinions, conclusions, interpretations, even if these are not in the exact language of the source,

D. any statements of fact, statistics, or scientific data that are neither knowledge nor the product of your unaided research.

Failure to footnote any of these constitutes plagiarism, and the penalties for plagiarism are severe. The correct forms for footnotes and bibliography in the humanities are found in the Harbrace Text, Chapter 33. Students in all nursing courses and advanced psychology courses are expected to follow APA style guidelines for research papers. For research papers in science, mathematics, sociology, or economics courses, consult your instructor for footnote form.

IV. Punctuality

Your paper must be submitted on or before the date set by the instructor.

College Rules for Maintenance of Public Order

Civil laws also affect campus life. The Henderson Act (Education Law § 6450) of the State of New York requires:

"The trustees or other governing board of every college chartered by the regents or incorporated by special act of the legislature shall adopt rules and regulations for the maintenance of public order on college campuses and other college property used for educational purposes and provide a program for the enforcement thereof. Such rules and regulations shall govern the conduct of students, faculty , and other staff as well as visitors and other licensees and invitees on such campuses and property. The penalties for violations of such rules and regulations shall be clearly set forth therein and shall include provisions for the ejection of a violator from such campus and property, and in the case of the student or faculty violator his suspension, expulsion or other appropriate disciplinary action...."

The Board of Trustees of the College of New Rochelle adopted the following statement in compliance with § 6450 of the Education Law of the State of New York:

I. Statement of Principles

The College of New Rochelle has as its purpose the education of its students and their complete development as persons committed to the creative and disciplined use of their intellects and the courageous and constructive use of their freedom. This educational goal demands mutual respect, honest searching, sensitivity to the concerns of others, and a free exchange of ideas. The freedom to speak and to assemble includes the freedom to dissent and to express dissent in an effective and orderly manner. While the College of New Rochelle has been able to develop structures through which disagreement can ordinarily be expressed, recognition is given to the fact that constant efforts are needed to keep the structures open and sensitive to the demands of education today.

II. Code of Conduct

The principles and regulations stated here shall govern the conduct of all persons on the campus of the College of New Rochelle or other property owned by it for educational purposes and shall be deemed included in the by-laws of all organizations on campus. Such organizations shall review annually such by-laws with the individuals who are members of such organizations. These principles and regulations shall apply to administrators, faculty, students, employees, on-campus organizations, visitors, licensees, and any other invitees. In acknowledging the right of its members to dissent and to engage in peaceful and orderly activities designed to bring about change, the College community respects the freedoms granted to the citizens of this democracy by the First Amendment. The College also recognizes that if it is to live as a community of scholars dedicated to a worthy educational goal, it cannot tolerate certain kinds of disruptive activities. Such activities include acts of violence or intimidation against persons, destruction or seizure of property, and disruptions which directly attack the vital processes of the College - teaching, learning, and living as a community of free persons committed to humane values.

All persons on the campus or other property owned by the College of New Rochelle for educational purposes shall comply therefore with the following standards of conduct:

1. No one shall obstruct, or disrupt, or attempt to obstruct or disrupt teaching activities or other College operations or functions.
2. No one shall interfere with the lawful exercises of freedom of speech, freedom of movement (pedestrian and/or vehicular), or freedom of peaceful assembly.
3. No one shall maliciously damage, misuse, or appropriate College property or the property of any person that is located on College property.
4. No unauthorized person shall possess or use firearms or other dangerous weapons on the campus.
5. No person shall refuse to comply with a lawful order of the President or her designated representative or public official acting in the performance of her duties in the administration and enforcement of these regulations.
6. No person or organization shall perform any action or create or encourage any situation which recklessly or intentionally endangers the mental or physical health of any person or involves the forced consumption of liquor or drugs for the purpose of initiation into or affiliation with any organizations.

III. Enforcement and Penalties — Agents

The College acknowledges its responsibility to distinguish among various kinds of disruption, to determine the relative seriousness of each instance of disruption and to respond appropriately. The President of the College, or in her absence the senior administrative officer present, shall be responsible for initiating the enforcement of these regulations. To assist her in the appropriate response, the President normally will seek the advice of a Special Commission formed of the following members: the Senior Vice President, the Executive Committee of the Council of the Faculty (an elected faculty committee), the Executive Committee of the College Senate, and two additional students elected by and from the student members of the Senate. The President and the Special Commission shall be responsible for prompt enforcement of these regulations, the application of remedies (e.g., ejection), and the initiation of appropriate disciplinary proceedings.

The College can imagine certain dire situations in which the President must act immediately. At such times the College recognizes the responsibility of the President to act unilaterally and affirms her right to do so.

Ejection

Any student, faculty member, administrator, employee, visitor, or invitee violating these regulations may be ejected from the College premises when such conduct constitutes a substantial danger to personal safety, to the educational activities of the College, or to property. The campus security force will normally be used to effect the ejections (cf. Section IV of this Statement — Relation to Civil Authorities).

Proceedings and Penalties

When informed that a student, faculty member, administrator, or employee may have violated these regulations, the President, and when possible the Special Commission, will promptly investigate the charges. If reasonable cause is shown to exist, written notification of the charges shall be delivered to the person(s) involved, in person or by registered mail, and a copy of the charges handed to the appropriate board or College authority for prompt disciplinary proceedings according to the following plans:

a) In the case of a student, judicial procedures with appropriate penalties, including restitution for any damages inflicted and sanctions up to and including probation, suspension, and expulsion.

b) In the case of an administrator or of a faculty member, procedures in conformity with recognized principles of AAC and AAUP and described in the Appendix of the Faculty Handbook shall be followed.

c) In the case of an employee, the appropriate College official shall take administrative action subject to College grievance procedures.

d) In the case of any organization operating on College property, the violation of these provisions shall result in the rescission of permission for that organization to operate on College property.

In the above case, the appropriate board or authority may impose suitable penalties, including suspension, expulsion, termination of contract, or dismissal from the College.

None of the above proceedings shall be construed to preclude sanctions under the penal law.

IV. Relation to Civil Authorities

The College community is a fragile and vulnerable embodiment of an ideal, and must therefore continually cultivate its development by renewing its commitment to justice and freedom in accordance with its special nature. The College, therefore, resolves to use reason and moral suasion as its primary means of maintaining order on campus. Only when the most severe threats occur and lead to an unquestionable possibility of violence against persons, destruction or seizure of property, disruptions which directly attack the vital processes of the College, may an appeal to outside agencies (e.g., the courts, local or state police) be made to assist in the restoration of order.

V. Amendments

These regulations may be amended in whole or in part from time to time by action of the Board of Trustees.

Noise Control Ordinance

Another civil law which impacts on campus life is the City of New Rochelle Noise Control Ordinance. Under the provisions of this City of New Rochelle law, undue and prolonged noise can result in the imposition of a fine on the person responsible. Yelling, the screeching of cars and gunning of motors, stereos, jukeboxes, etc., are all areas that can cause complaints and resultant fines.

Grievance Process

A **Grievance** is a matter of serious neglect, mismanagement, or mistreatment about which you wish to lodge a formal complaint. Should such a situation arise, the best thing to do is to discuss it with the person immediately involved. If this interview does not resolve the problem to your satisfaction, then make an appointment to review it with the person's supervisor.

For example, if your grievance is with a faculty member, you should first discuss it with him or her. If this discussion is not satisfactory, you should address the matter with the chairperson of the department of which the professor is a member, and if the matter is still unresolved, it should be communicated to the dean of the appropriate school.

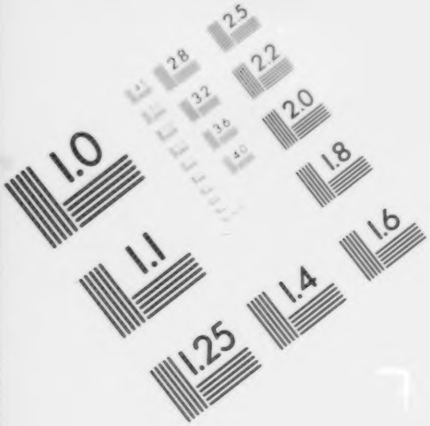
If your grievance is with a non-academic administrator or staff person, you should first discuss it with the person. If this is not helpful, you should inform the supervisor of the administrator or staff member. The area vice president is your final resource person for non-academic grievances.

Judicial Process

The basic philosophy of discipline at the College of New Rochelle is one of education rather than punitive sanctions. Judicial bodies appropriate for each school and various student populations, are established to deal with reported infractions of regulations and policies listed in the Student Code of Conduct and in the *Residence Life Handbook*.

In all cases, the student reported is fully informed about the infraction, the judicial process, the right to have an advisor and/or witness, and the right to appeal.

Further information regarding the judicial process and students' rights and responsibilities is available in the Office of the Vice President for Student Services.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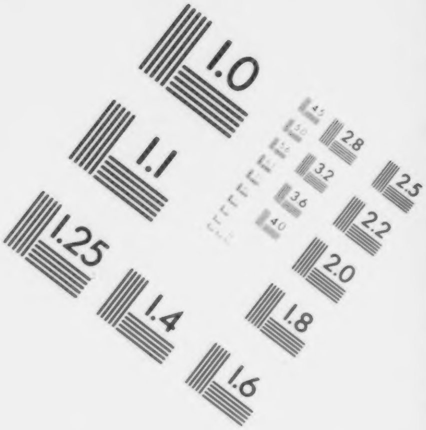
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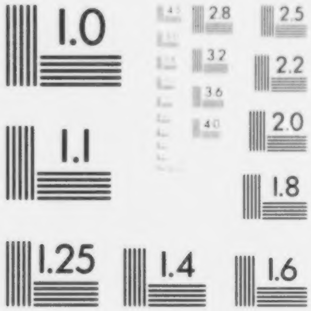
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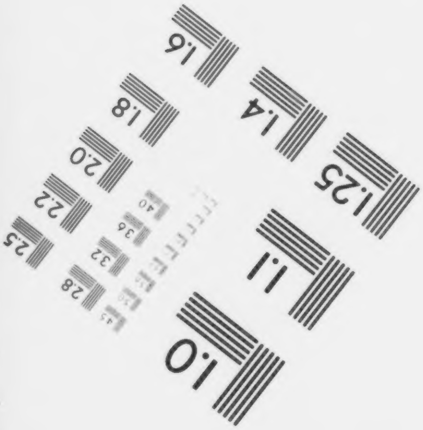
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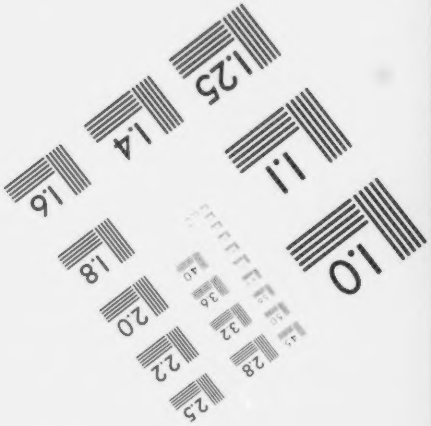
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ACADEMIC FREEDOM FOR STUDENTS AT MICHIGAN STATE UNIVERSITY

FOREWORD

The foreword is not a part of the document that follows. It supplies, however, a necessary perspective for interpreting the document.

Student rights and responsibilities at Michigan State University must be understood against the social and historical background of the University itself.

When, more than a century ago, the people of Michigan established this institution on the land-grant principle, they framed a new conception of the role of the University in American life.

A land-grant university is a trusteeship of intellect in the service of society. It gathers society's creative and critical powers and uses them to advance the common good and to solve fundamental problems.

That is the special character that has caused the land-grant university to become one of the great transforming agencies of the American scene. When it honors its commission, it acts not for the sake of the academic community, but for the sake of society beyond the academy. All members of the academic community —trustees, administrators, faculty, staff, and students — enact a trust of which society beyond the University is the proper beneficiary.

The real significance of this document, as we believe, is not that students have acquired rights, but that they have explicitly been made party to our social trust. The responsibility which lies upon the trustees, the administration, and the faculty continues. They remain guardians of the University, charged with preserving in it the genius of scholarship and the conditions of inquiry which society has entrusted to their care.

PREFACE

This report, the *Graduate Student Rights and Responsibilities* document, and the *Medical Students Rights and Responsibilities* document contain guidelines to the rights and duties of students in matters of conduct, academic pursuits, the keeping of records, and publications. This report describes structures and procedures for the formulation of regulations governing student conduct, for the interpretation and amendment of the guidelines, for the adjudication of student disciplinary cases, and for channeling student complaints, grievances, or concerns to faculty, staff, and administrators for appropriate action.

For the most part, these provisions simply make explicit what has been long understood and practiced at Michigan State University. This report identifies rights and duties of students and provides for students a carefully prescribed system of due process. The report does not contain a general or abstract definition of academic freedom. Rather, the report is an operational definition with concrete application of the concept of academic freedom for students.

ARTICLE 1

Student Rights and Responsibilities at Michigan State University

1.1 Michigan State University is a community of scholars whose members include its faculty, staff, students, and administrators. The basic purposes of the University are the advancement, dissemination, and application of knowledge. The most basic condition for the achievement of these purposes is freedom of expression and communication. Without this freedom, effective sifting and testing of ideas cease, and research, teaching, and learning are stifled. Knowledge is as broad and diverse as life itself, and the need for freedom is equally broad. Yet absolute freedom in all aspects of life means anarchy, just as absolute order means tyranny. Both anarchy and tyranny are antithetical to the purposes and character of the University. Therefore, the University always must strive to strike that balance between maximum freedom and necessary order which best promotes its basic purposes by providing the environment most conducive to the many faceted activities of instruction, research, and service.

1.2 Each right of an individual places a reciprocal duty upon others: the duty to permit the individual to exercise the right. The student, as a member of the academic community, has both rights and duties. Within that community, the student's most essential right is the right to learn. The University has a duty to provide for the student those privileges, opportunities, and protections which best promote the learning process in all its aspects. The student also has duties to other members of the academic community, the most important of which is to refrain from interference with those rights of others which are equally essential to the purposes and processes of the University.

1.3 The University cherishes many values, modes of thought, and standards of behavior that are better taught by example, persuasion, social pressure, and rewards than by the threat of penalties. Regulations governing the activities and conduct of student groups and individual students should not be comprehensive codes of desirable conduct; rather, they should be limited to the prescription of procedures for meeting the practical, routine necessities of a complex community and to the prohibition or limitation of acts which cannot be tolerated because they seriously interfere with the basic purposes, necessities, and processes of the academic community, or with rights essential to other members of the community.

1.4 The student is not only a member of the academic community, but a citizen of the larger society, who retains those rights, protections, and guarantees of fair treatment held by all citizens, and which the University may not deny. The enforcement of the student's duties to the larger society is, however, the responsibility of the legal and judicial authorities duly established for that purpose.

Guidelines

1.5 To protect student rights and to facilitate the definition of student responsibilities at Michigan State University, the following guidelines shall apply to those stipulations and conditions by which student conduct is regulated, broadly referred to as "regulations" in the remainder of this Article.

1.5.1 All regulations shall seek the best possible reconciliation of the principles of maximum freedom and necessary order.

1.5.2 There shall be no regulation unless there is a demonstrable need which is reasonably related to the basic purposes and necessities of the University as stipulated herein.

1.5.3 To the maximum extent feasible, students shall participate in formulating and revising regulations governing student conduct.

1.5.4 All regulations governing student conduct shall be made public in an appropriate manner.

1.5.5 Every regulation shall be as brief, clear, and specific as possible.

1.5.6 Wherever rights conflict, regulations shall, to the maximum extent feasible, permit reasonable scope for each conflicting right by defining the circumstances of time, place, and means appropriate to its exercise.

1.5.7 Regulations shall respect the free expression of ideas and shall encourage the competition of ideas from diverse perspectives.

1.5.8 Procedures and penalties for the violation of regulations shall be designed for guidance or correction of behavior only.

1.5.9 Penalties shall be commensurate with the seriousness of the offense. Repeated violations may justify increasingly severe penalties.

1.5.10 There shall be clearly defined channels and procedures for the appeal and review of:

a. The finding of guilt in an alleged violation of a regulation.

b. The reasonableness, under the circumstances, of the penalty imposed for a specific violation.

c. The substance of a regulation or administrative decision which is alleged to be inconsistent with the guidelines in this document.

d. The fairness of the procedures followed in the adjudication.

1.5.11 Every regulation shall specify to whom it applies and whether responsibility for compliance lies with individuals, with groups, or with both.

1.6 Handbook of Regulations and Structures: A handbook of the University's current regulations and structures relating to student rights and responsibilities shall be made available to every member of the academic community.

ARTICLE 2

Academic Rights and Responsibilities

2.1. Preamble

2.1.1 The freedom and effectiveness of the educational process depend upon the provision of appropriate conditions and opportunities for learning in an environment that is supportive of diversity among ideas, cultures, and student characteristics. The responsibility to secure, respect, and protect such opportunities and conditions is shared by all members of the academic community. The primacy of the faculty's role and its centrality in the educational process must be recognized and preserved. The primary intellectual purpose of the University — its intellectual content and integrity — is the responsibility of the faculty.

2.1.2 The establishment and maintenance of the proper relationship between instructor and student are fundamental to the University's function, and require both instructor and student to recognize the rights and responsibilities which derive from it. The relationship between instructor and student as individuals should be founded on mutual respect and understanding together with shared dedication to the educational process.

2.2 Role of the Faculty in the Instructional Process

2.2.1 No provision for the rights of students can be valid which suspends the rights of the faculty. The student's right to competent instruction must be reconciled with the rights of the faculty, consistent with the principle that the competency of a professional can be rightly judged only by professionals. It is therefore acknowledged and mandated that competence of instruction shall be judged by the faculty.

2.2.2 Teaching units shall provide appropriate and clearly defined channels for the receipt and consideration of student complaints concerning instruction. In no instance shall the competence of instruction form the basis of an adversarial proceeding before any of the judicial bodies established in this document.

2.2.3 Faculty shall have authority and responsibility for academic policy and practices in areas such as degree eligibility and requirements, course content and grading, classroom procedure, and standards of professional behavior in accordance with the *Bylaws for Academic Governance*, the *Code of Teaching Responsibility*, and other documents on faculty rights and responsibilities.

2.2.4. No hearing board established under this document shall interfere with the evaluation of a student which represents a course instructor's good faith judgment of the student's performance. In the event that an evaluation is determined to be based on inappropriate or irrelevant factors, as discussed in 2.3.2 below, the dean of the college shall cause the student's performance to be reassessed and good faith evaluation established.

2.3 Rights and Responsibilities of the Student

2.3.1 The student is responsible for learning the content of a course of study according to standards of performance established by the faculty and for adhering to standards of professional behavior established by the faculty.

2.3.2 The student has a right to academic evaluations which represent the course instructor's good faith judgments of performance. Course grades shall represent the instructor's professional and objective evaluation of the student's academic performance. The student shall have the right to know all course requirements, including grading criteria, and procedures at the beginning of the course. Course evaluation procedures are covered by the *Code of Teaching Responsibility*.

2.3.2.1 To overcome the presumption of good faith, it must be demonstrated that an evaluation was based entirely or in part upon factors that are inappropriate or irrelevant both to academic performance and applicable professional standards.

2.3.3 The student shares with the faculty the responsibility for maintaining the integrity of scholarship, grades, and professional standards.

2.3.4 The student shall be free to take reasoned exception to information and views offered in the classroom, and to reserve judgment about matters of opinion, without fear of penalty.

2.3.5 The student's behavior in the classroom shall be conducive to the teaching and learning process for all concerned.

2.3.6 The student has a right to be governed by educationally justifiable academic regulations and professional standards.

2.3.7 The student has a right to accurate, timely, and clearly stated information concerning general academic requirements for establishing and maintaining an acceptable academic standing, the student's academic relationship with the University and the details of any special conditions which may apply, and graduation requirements for the student's academic program. Students are responsible for informing themselves of University, college, department, and school requirements as stated in unit publications and in the University catalog. In planning to meet such requirements, students are responsible for consulting with their academic advisors.

2.3.8 The student has a right to protection against improper disclosure of information concerning academic performance and personal characteristics such as values, beliefs, organizational affiliations, and health.

2.3.9 The student has a right to be protected from personal exploitation and to receive recognition for scholarly assistance to faculty.

2.3.10 The student has a right to scholarly relationships with faculty based on mutual trust and civility.

2.4 Adjudication of Undergraduate Student Grievances and Cases of Academic Dishonesty, Violations of Professional Standards, and Falsification of Admissions and Academic Records.

2.4.1 The University undertakes, within the limits of its resources and the limits imposed by due respect for the professional rights of the faculty, to supply an appropriate remedy for legitimate student grievances. (The limits of the University's resources proceed from factors that, while subject to its influence, are not always subject to its control.)

2.4.1.1 Procedures for the adjudication of grievances must proceed in a timely manner.

2.4.2 If problems arise in the relationship between instructor and student, both should attempt to resolve them in informal, direct discussions. If the problem remains unresolved, then the chief administrator of the unit and/or the Ombudsman should be consulted. If still aggrieved, a student may then submit a formal, written grievance for consideration by an appropriate hearing board. The formal grievance alleging violations of academic rights must include a proposed remedy, which could be implemented by a responsible administrator.

2.4.2.1 Grievances must normally be initiated no later than mid-term of the quarter following the one wherein the alleged violation occurred. If the involved instructor or student is absent from the University during the quarter, or if other appropriate reasons exist, an exception to this provision shall be granted by the unit. If the involved instructor is no longer employed by the University before the formal grievance procedure is completed, the grievance process may proceed.

2.4.2.2 Student grievances must be initiated at the lowest administrative level feasible: normally, the department/school. With the approval of the college dean, small departments/schools may waive jurisdiction and refer grievances to the college hearing board.

2.4.2.3 Administrators shall transmit written grievances promptly to the unit hearing board and to the instructor or other persons party to the matter.

2.4.3 For the purpose of constituting a department/school or college hearing board, undergraduate students shall be represented on the hearing board.

2.4.4 Parties to a grievance shall have an opportunity to state their cases, present evidence, designate witnesses, ask questions, and present a rebuttal.

2.4.4.1 Units shall constitute their hearing boards and establish their own procedures in a manner consistent with this document. A copy of procedures adopted by each unit shall be filed with the Office of the Ombudsman and with other appropriate offices.

2.4.4.2 Unit hearing boards shall ensure that a collegial atmosphere prevails in grievance hearings. Involvement of counsel should normally not be required. When present, counsel shall be limited to a member of the student body, faculty, or staff of the University. No member of the University's legal department shall serve as counsel under these provisions.

2.4.5 The hearing board shall prepare a written report of findings, and forward copies to the parties involved and to the Ombudsman. All recipients are expected to respect the confidentiality of this report. When a hearing committee finds that a violation of academic rights has occurred and that redress is possible, it shall direct that redress be provided. The responsible administrator, with the advice of the hearing board, shall implement an appropriate remedy.

2.4.6 The appropriate initial judiciary for cases involving alleged violations of regulations prohibiting academic dishonesty, violations of professional standards, or falsification of admission or academic records by undergraduate students which are referred for disciplinary action shall be the hearing board of the college within which the violation is alleged to have occurred.

2.4.6.1 In cases of ambiguous jurisdiction, the appropriate judiciary will be randomly selected by the Assistant Provost for Undergraduate Education from the hearing boards for the Colleges of Arts and Letters, Natural Science, and Social Science.

2.4.6.2 In cases of academic dishonesty, violations of professional standards, or falsification of admission or academic records by undergraduate students which are referred for disciplinary action, the college level hearing boards shall have available to them the full range of decisions provided to a judiciary for disciplinary cases through this document. The dean of the student's college may implement the finding, request the hearing board to reconsider its decision, or forward the finding and a conflicting recommendation to the Office of the Provost for final resolution.

2.4.7 Either party to a grievance may appeal the decision of the department/school hearing board to the college hearing board. All appeals must be in writing. When a college hearing board finds that a violation of academic rights has occurred and that redress is possible, it shall direct that redress be provided. The responsible administrator, with the advice of the board, shall implement an appropriate remedy.

2.4.7.1 Either party to a grievance may appeal the decision of the college hearing board to the University Academic Integrity Review Board only in cases of a penalty grade for academic dishonesty; cases involving alleged violations of regulations prohibiting academic dishonesty, violations of professional standards or falsifications of admission and academic records by undergraduate students which are referred for disciplinary action; or other grievances heard only at the college level. All grievances must be in writing. When the University Academic Integrity Review Board finds that such a violation of academic rights has occurred and that redress is possible, it shall direct that redress be provided. The responsible administrator, with the advice of the board, shall implement an appropriate remedy.

2.4.7.1.1 All appeals to the University Academic Integrity Review Board in cases of a penalty grade for academic dishonesty must specify the alleged defects in the substance and/or procedures of the previous adjudication(s) in sufficient particularity to justify further proceedings.

2.4.7.1.2 All appeals to the University Academic Integrity Review Board in cases of alleged violations of regulations prohibiting academic dishonesty, violations of professional standards, or falsification of admission and academic records which are referred for disciplinary action must specify the alleged defects in the substance and/or procedures of the previous adjudication in sufficient particularity to justify further proceedings.

2.4.7.2 Appeals may challenge the substance of a decision and/or the procedures employed in the adjudication. (Presentation of new evidence will normally be inappropriate at an appeal hearing.)

2.4.7.3. Appeals must be filed within ten class days following notice of a decision. The original decision shall be held in abeyance while under appeal.

2.4.8 If a student is accused of academic dishonesty and is referred for judicial action, and if a disciplinary sanction is not held to be supported by the preponderance of evidence as required in Article 4, the student may appeal a penalty grade received in the case to the department/school hearing board as indicated in 2.4.9.

2.4.9 A student who receives a penalty grade based upon a charge of academic dishonesty, even if not referred for disciplinary action, may seek a hearing according to the procedures in this Article. In such a hearing, the burden of proof shall rest upon the instructor whose prior assignment of the penalty grade will constitute a charge of academic dishonesty. The hearing board shall proceed in compliance with applicable academic legislation on the integrity of scholarship, grades, and professional standards, and the procedural and appeal provisions of this document shall apply.

3.52 ACADEMIC HONESTY AND ACADEMIC FRAUD IN RESEARCH AND SCHOLARSHIP DEPARTMENTAL GUIDELINES FOR STUDENTS

MIT assumes that all students come to the institute for a serious purpose and expects them to be responsible individuals who demand of themselves high standards of honesty and personal conduct. Cheating, plagiarism, unauthorized collaboration, and other forms of academic dishonesty are considered serious offenses for which disciplinary penalties can be imposed.

Some academic offenses by students may be handled directly between the faculty member and student, possibly with assistance of the head of the faculty member's department.

The following are suggestions, prepared by the Office of the Provost, the Office of the Dean for Student Affairs, and the Special Assistant to the President, for how faculty members and departments can communicate their expectations of academic conduct and how they can handle violations of these expectations.

3.52.1 COMMUNICATING FACULTY EXPECTATIONS OF ACADEMIC CONDUCT

At the beginning of each term, faculty members are encouraged to make clear to the students in their classes their expectations regarding permissible academic conduct. It is important that this be done in the context of their specific subjects.

Some expectations are obvious: students should realize they are expected not to copy other students' responses during quizzes, or to represent term papers written by others as their own work.

There are gray areas, however, in which the standards can vary from subject to subject and from department to department.

A particularly troublesome area for some students is the question of working together on problem sets or other homework assignments. The use of the old solutions sets or lab reports presents a similar problem. Because homework assignments have two roles -- helping students learn the material and helping instructors evaluate academic performance -- it is not always obvious how much collaboration or assistance from old materials, if any, the instructor expects. Sometimes this can be inferred from the amount of weight given to homework in the grading process, but students often do not make this inference correctly. It is therefore important for faculty members to explain as precisely as possible their expectations about the nature and extent of any collaboration or assistance from old materials they permit or encourage. Where assistance from old materials is expected, the instructor should be certain that the materials are equally available to all students.

In addition, some students may be accustomed to different cultural values and priorities with respect to academic honesty. This increases the need for clearly stated expectations.

3.52.2 DEPARTMENTAL HANDLING OF VIOLATIONS OF THESE EXPECTATIONS

1) Within each department, there should be a senior member of the Faculty, such as the department head, who can provide guidance to faculty members and to students in cases of suspected academic dishonesty. In particular, this individual should be able to give advice about the alternative courses of action that are available, about the norms of fairness within the department and throughout the Institute, and about the rights of students. In addition, deans in the Office of the Dean for Student Affairs (ODSA), as well as the Special Assistants to the President, are available for consultations with students, faculty, and department heads.

2) When a faculty member believes that a student has violated the expected standards of academic conduct, it is generally advisable to arrange to talk privately with the student as soon as possible. The request for a meeting should be in writing; before the meeting, the suspected student should be informed that he or she has a right to come accompanied by any other member of the MIT community. At this meeting, the faculty member will want to explain the reason for believing that a breach of academic honesty has occurred, and to give the student the opportunity to respond fully to all allegations. Appropriate effort should be made during this meeting to avoid an atmosphere in which the student feels harassed.

Prior to this meeting with the student, care should be taken to protect the student's privacy, especially since the facts will not yet have been determined. It is usually not advisable to discuss the incident with other faculty members, including the student's advisor, except to seek the kind of guidance referred to in paragraph 1) above.

3) As a result of the discussion between the faculty member and the student, the faculty member may conclude that the student has, in fact, behaved dishonestly and may wish to take some further action.

The faculty member may decide to take a direct action (such as one of those described in the next section) or to bring the case to the ODSA or to the Committee on Discipline (COD) for resolution. In making this choice, the faculty member should take into account such factors as the severity of the offense, the attitude of the student, and the amount of uncertainty that exists over the facts.

Before making a decisions (but after meeting with the student), the faculty member may wish to check with the ODSA to determine if the student has received any previous warning letters as the result of academic dishonesty. If the faculty member defers making a decision for this reason, the student should be told when to expect to be notified of the decision.

4) Among the direct actions that the faculty member may wish to take are the following:

Reduced grade: The faculty member will probably want to assign the student a grade that reflects only the work that the student actually did. If the misconduct of the student is sufficiently serious to merit an F in the subject, or if the student has received previous warning letters about such misconduct, the faculty members should seriously consider referring the present case to the ODSA or to the COD.

Faculty warning letter: The faculty member may want to write a letter to the student explaining the conclusion that the student behaved dishonestly with respect to the assignment or exam, and that the grade given reflects only what appears to be the student's honest contributions.

A copy of the warning letter may be sent to the ODSA. This copy will be kept in a special file only for such copies (not as part of the student's own file). Deans in the ODSA (only) will be able to access this copy when helping a faculty member choose a course of action as a result of any future dishonest act by this student. If a copy is sent to the ODSA, the letter should say so and warn that any future act of academic misconduct at MIT will therefore be treated much more seriously. If the student disputes any of the facts contained in the letter, he or she should be permitted to append an explanatory statement to the ODSA copy.

It is not advisable that any other copies of the letter by disseminated.

Redo assignment or exam: In cases where the faculty member is not sure that the student has intentionally acted dishonestly, but where the amount of independent work performed by the student is clearly inadequate, the faculty member may want to ask the student to complete a substitute assignment or exam. This would be appropriate, for example when there is an honest misunderstanding about the degree of collaboration that a faculty member permits.

5) If the COD handles the case, its decision is final unless the Committee recommends that the student be either suspended or expelled, in which case the final sanction is decided by the President.

If the faculty member handles the case, the faculty member should inform the student that if he or she disagrees with the faculty member's disposition of the incident, it can be reviewed by the head of the department. Further review may be requested of the dean of the appropriate School. If the student feels aggrieved after these steps have been taken or attempted, the student is encouraged to consult the ODSA for advice about the possibility of proceeding further and to consult the MIT complaint policy described in the *Courses and Degree Programs* catalogue under "Institute Regulations." (See also Section 3.33 Complaint and Grievance Procedures for Those Who Work and Study at MIT.)

Academic Integrity Policy

Students enrolled at Fairleigh Dickinson University are expected to maintain the highest standards of academic honesty. Fairleigh Dickinson University will not condone academic dishonesty in any form. To do so would be unfair to those students who perform honestly. Academic dishonesty undermines the confidence of the student in his or her ability to learn and perform and casts a shadow on the value of all our degrees, present, past, and future. Students have a responsibility to each other to report academic dishonesty to the proper academic authority.

Academic dishonesty includes, but is not necessarily limited to, the following:

1. **Cheating** - Giving or receiving unauthorized assistance in any academic exercise or examination. Using or attempting to use any unauthorized materials, information, or study aids in an examination or academic exercise.

2. **Plagiarism** - Representing the ideas or language of others as one's own.

3. **Falsification** - Falsifying or inventing any information, data, or citation in an academic exercise.

4. **Multiple Submission** - Submitting substantially the same written work to more than one instructor without the knowledge and permission of the instructors involved.

5. **Compliancy** - Facilitating any of the above actions or performing work which a fellow student then presents as his or her own.

6. **Interference** - Interfering with the ability of a fellow student to perform his or her assignments.

Sanctions: Any student found guilty of academic dishonesty will, for the first offense, receive an "F" in the course. This grade is permanent and cannot be removed from the transcript. In cases of interference and compliance, where the student is not registered in the affected course, the incident will be recorded on the student's permanent record card. For a second offense of academic dishonesty, a student will be suspended from the University for one year. Readmission will be contingent upon the approval of the academic dean.

Procedure: When a student is charged with academic dishonesty (cheating, plagiarism, or fraud), his/her instructor will send a letter to the student stating the formal charge and the sanctions to be imposed (as outlined in the University *Bulletin*). The letter should also contain a two-week deadline date to file an appeal and a copy of the "Appeals Process." The instructor will send copies of the letter and supporting evidence to the chair of the department and academic dean of the college in which the dishonesty took place. After the appeals process, the academic dean will then notify the campus Dean of Students and Director of Enrollment Services of the sanction.

Appeals Process: Students who are charged with academic dishonesty by an instructor may appeal this charge to the chairperson of the department in which the incident took place. Subsequently, the student may appeal to a three-person committee consisting of the academic dean of the college in which the academic dishonesty took place, the campus Dean of Students, and a faculty member from the department of the student's major. If the academic dishonesty took place in the student's major, then another faculty member from the college will serve on the committee. The committee will be chaired and convened by the academic dean of the college. The student may appeal the facts of the charge; the penalty is fixed and cannot be appealed.

University Regulations

Non-Discriminatory Policy: Fairleigh Dickinson University is committed to a policy of non-discrimination in all its operations and facilities. Consequently, it does not tolerate any behavior or expression of attitude by individuals or groups which conflicts with that commitment.

Drugs: Narcotics, hallucinogens, and other illegal drugs are not permitted on University property, including the residence halls. Use of drugs in any vehicle on campus is likewise prohibited. Infractions are subject to University discipline in the form of disciplinary probation, suspension or dismissal.

A student arrested for a drug offense may continue in good standing subject to the recommendation of the Dean of Students. Those students found guilty by civil courts of illegal use may be dismissed by the Dean of Students and may not be permitted to reregister without special approval.

Alcoholic Beverages: Students under 21 years of age are not permitted to possess or consume alcoholic beverages on campus. Those students who may legally do so are permitted to consume alcoholic beverages in specifically designated areas only.

Guests on Campus: Guests and visitors are always welcome but could require a special visitor or guest pass. Loiterers and vendors are not permitted and may be required to vacate the campus.

Federal, State and Municipal Laws: The University prohibits any conduct in violation of federal, state, or municipal laws and ordinances.

Firearms: Lethal weapons, firearms, and fireworks are not permitted on campus for any reason.

Parking: Students must comply with all parking regulations, particularly those concerning fire zone areas and restricted areas. See Parking Manual for complete campus regulations.

Posting of Bills: Posters and other forms of advertising on the campus must conform to campus regulations available at the Student Activities Office and must be stamped by this office prior to posting.

Students in violation of any of the above regulations are subject to disciplinary action. The townships of Florham Park, Madison, Rutherford and Teaneck, and the city of Hackensack are resources to the campus community. Our neighbors offer students a variety of cultural activities, off-campus housing, employment, and convenient shopping areas. Friendly, constructive town relationships contribute to students' overall education. The University works cooperatively with the surrounding communities. Any violation of town laws could subject a student to campus action.

Code of Student Rights, Responsibilities and Conduct

I. Definitions

When used in this code:

A. The term "University" means Fairleigh Dickinson University and, collectively, those responsible for its control and operation.

B. The term "student" includes all persons registered at the University, both full-time and part-time, pursuing undergraduate studies, graduate studies, or registered for continuing education courses.

C. The term "instructor" means any person designated by the University to conduct educational activities.

D. The term "organization" means a number of students who have complied with the formal requirements for University recognition as provided herein.

E. The term "group" means a number of students who have not yet complied with the formal requirements for becoming an organization.

F. The term "student press" means either an organization whose primary purpose is to publish and distribute any publication on campus or a regular publication of an organization.

G. The term "custodian" means the administrative officer with supervisory authority in the area under discussion.

H. The term "shall" is used in the imperative sense.

I. The term "may" is used in the permissive sense.

J. All other terms have their common usage unless the context dictates otherwise.

II. Institutional Governance

All constituents of the University community are free, individually and collectively, to express their views on issues of University policy and on matters of interest to the student body.

A. Students may express themselves on all University policies affecting academic and student affairs through the Student Government and appropriate University and campus committees.

B. The students' role in University governance is determined by the Board of Trustees.

III. Bill of Rights

The following rights shall not be construed to deny or disparage other rights retained by students as members of the student body or as citizens of the local community, state, and nation.

A. Free inquiry, expression and assembly are guaranteed all students within reasonable bounds established by the University.

B. Students are free to pursue their educational goals; appropriate opportunities for learning in the classroom and on the campus shall be provided by the University.

C. Legal rights of students to privacy in their persons, campus living quarters, papers, and effects shall be respected.

D. Except in unusual circumstances, no disciplinary sanctions may be imposed upon students without notice of the nature and cause of the charges; and only after the opportunity to have a fair hearing which may include witnesses and the assistance of a person of their choosing. This adviser may not be a practicing attorney. (See XIII. J. 5.)

E. A student accused of violating University regulations shall appear before the appropriate judicial body unless the accused admits guilt and is prepared to accept the sanction(s) imposed by the Dean of Students. If the accused admits guilt and wishes to waive the hearing before the Campus Standards Committee, the Dean of Students may nevertheless seek the committee's advice or mandate the Campus Standards Process.

IV. Student Records

With respect to student records; all students of the University have rights pursuant to the Buckley Amendment (Family Education Rights and Privacy Act of 1974).

V. Campus Expression

Discussion and expression of all views are permitted within the University, subject only to the requirements for the maintenance of order.

A. Support of any cause by orderly means is permitted, provided it does not disrupt the operation of the University.

B. The right of peaceful protest is guaranteed within the University community. However, the University retains the right and recognizes the obligation to assure the safety of individuals, the protection of property and individual rights, and the continuity of the educational process.

C. Orderly picketing and other forms of peaceful protest are permitted on University premises and in the public areas of University buildings provided they shall not interfere with ingress and egress, disrupt classes, the operation of offices, or damage property.

1. University facilities shall be assigned to organizations, groups and individuals for regular business meetings, social programs, and programs open to the public on a space-available basis.

2. The individual group or organization requesting space must inform the University of the general purpose of the function. The University retains the right to control time, place and manner requirements.

3. An individual or organization that abuses assigned facilities will be responsible for making restitution for damages and may have limitations imposed on future utilization of space and may be subject to disciplinary action.

D. Every qualified student has the right to an employment interview on campus by any recruitment organization desiring to recruit at the University, provided said organization has registered with Career Services and is a bonafide employer.

E. Students, student groups and campus organizations may invite and hear any persons of their own choosing subject to the requirements herein for use of University facilities.

F. The University is committed to protect students from discrimination on the basis of gender, age, race, creed, handicap, national origin or sexual orientation.

VI. Publications

Editors and managers of the student press shall not be arbitrarily suspended because of student, faculty, administration, alumni or community disapproval of editorial policy or content. Similar freedom is assured oral statements of views on a student-managed radio or television station.

A. This editorial freedom entails a corollary obligation under the canons of responsible journalism and applicable regulations of the Federal Communications Commission. The student press is to be accurate in quotations and literate in presentation.

B. Students must recognize the legal and fiduciary obligations incumbent upon them and the University in all publication matters. There also must be a recognition that freedom of expression with opportunity for responsible replies is one of the characteristics of higher education in the United States.

C. Campus Media Boards, composed of students, faculty and administrators, are charged with implementation of all University media policy.

D. All student communications shall explicitly state on the editorial page or in broadcast that opinions expressed are not necessarily those of the University or its student body.

VII. Campus Organizations

Organizations and groups may be established within the University for any legal purpose. An affiliation with an extramural organization shall not in itself disqualify the University branch or chapter from University privileges.

A. A group which wishes to become a recognized campus organization must comply with the following:

1. Submit a list of officers and copies of the constitution and bylaws to the Dean of Students or designee for review and approval in accordance with established procedures. Amendments shall be submitted for approval four weeks before they become effective.

2. Where there is affiliation with an extramural organization, the extramural organization's constitution and bylaws shall be filed with the Dean of Students or designee and reviewed for conflicts with University policy. Amendments shall be submitted to the University for review.

B. Recognition of an organization by the University implies neither approval nor disapproval of the aims, objectives, and policies of the organization.

C. Any organization which engages in illegal activities on or off campus will have sanctions imposed against it by the Dean of Students and through the campus standards process. Such an organization is also liable to action by external sources.

D. Discrimination on the basis of color, creed, age, handicap, national origin, race, gender, or sexual orientation is prohibited.

E. Membership in all University student-related organizations shall be open to any student member of the University who is willing to subscribe to the stated aims and meet the stated criteria and obligations of the organization.

F. Membership lists may be required as a condition of access to student activity funds and University facilities.

G. The lists of names and addresses will be confined to the files of the Student Activities Office, Dean of Students, and Offices of Student Government. The names and addresses of organizational officers may be released at the discretion of the Dean of Students or designee and in accord with the stipulations of the Buckley Amendment (Family Education Rights and Privacy Act of 1974).

H. All organization contractual agreements and/or financial transactions must be approved by the Director of Student Activities.

I. Each organization is responsible for the behavior of its members at all times when they are acting under the auspices of the groups.

J. Each organization is subject to rules, regulations and/or procedures established by appropriate organizational governing boards.

VIII. Hazing Policy

A. Fairleigh Dickinson University adheres to state, local and federal guidelines in all matters. It has adopted a hazing policy which is consistent with state prohibitions on hazing activities. Hazing is defined as:

1. Any action or situation which recklessly intentionally or unintentionally endangers the

mental or physical health or safety of a student OR WHICH WILLFULLY DESTROYS OR REMOVES PUBLIC OR PRIVATE PROPERTY for the purpose of initiation or admission into or affiliation with, OR AS A CONDITION FOR CONTINUED MEMBERSHIP IN, any organization operating under the sanction of OR RECOGNIZED AS AN ORGANIZATION BY Fairleigh Dickinson University.

2. Such actions and situations include paddling in any form; creation of excessive fatigue; physical and psychological shocks; quests; treasure hunts; scavenger hunts; road trips or any other such activities carried on outside the confines of the University; wearing, publicly, apparel which is conspicuous and not normally in good taste; engaging in public stunts and buffoonery; morally degrading or humiliating games and activities; late work sessions which interfere with scholastic activities; any forced consumption of alcohol or drugs; and any other activities which are not consistent with ritual or policy or the regulations and policies of Fairleigh Dickinson University.

B. Hazing is dangerous and unnecessary, and contrary to the educational goals and process of Fairleigh Dickinson University.

C. If a student or organization is involved in a hazing incident, appropriate action will be taken.

IX. Student Rights and Residence Halls

As part of its educational mission, the University owns and operates residence halls. Students shall have a voice in recommending residence hall programs and policies.

A. A Residence Hall Judicial Board or Campus Standards Committee will be charged with dealing with violations of regulations specifically pertaining to residence halls policy.

B. The University reserves the right of room inspection to insure compliance with regulations and standards. Room inspections, unless motivated by emergency or conditions beyond the control of the University, will be in compliance with the University housing contract. When residents request maintenance service for their rooms, consent to enter shall be considered implicit in the request.

C. Should the University conduct a room search, an attempt will be made to obtain the consent of the resident. Searches can be made without consent when there exists reasonable cause to believe that a violation of University regulations either has, or is in the process of taking place.

D. Further rules and regulations will be specified in the Residence Hall Handbook.

X. Guest Policy

A. FDU students assume full responsibility for the behavior for their on-campus guests at all times. Guests' inappropriate behavior may result in disciplinary sanctions against the host.

B. Disciplinary action may also be taken against students hosting individuals who have been banned from the residence halls on campus.

C. Refer to Residence Life Handbook for guest policy in the Residence Halls.

XI. Violation of University Standards

Generally, institutional discipline shall be applied to conduct which adversely affects the University community's pursuit of its educational objectives. The following are examples of conduct which would be subject to disciplinary actions.

A. Verbal or physical obstruction, assault, abuse or disruption of teaching, research or disciplinary proceedings or of any individual, office or authorized University program, event, function or activity.

B. Threat, or infliction of bodily harm, hazing or physical abuse or injury to the person of another student, faculty or staff member, administrative officer or guest of the University.

C. Forgery, alteration, unauthorized use or misuse of any official University document.

D. Unauthorized use or misuse, including mutilation and/or defacing, of educational materials, records or property.

E. Furnishing false information to the University with intent to deceive.

F. Attempted theft, theft, bribery, extortion, misappropriation of funds or property, vandalism, and/or possession of stolen property.

G. Non-accidental damage, grossly negligent damage or arson to any University property or private property of another student, faculty member, staff member, administrative officer or campus visitor.

H. The violation of any criminal statutes of the state of New Jersey, such as those which apply to alcohol, gambling, extortion, terrorism, sale of contraband, et cetera, which occurs on the college campus, directly affects the University community.

I. Inducing, coercing, or assisting another to do any act which could subject a student to charges of violation of campus standards.

J. Illegal use, possession, illegal distribution, transfer, or sale of narcotics, hallucinogenic agents and other controlled or dangerous substances on campus.

K. Construction, actual possession and/or use of firearms, other potentially dangerous weapons and inherently dangerous or explosive materials, including fireworks and/or arson.

L. Submitting a check not covered by sufficient funds to a campus official or service or failure to repay monies from official student loan funds by agreed deadline.

M. Racial harassment, insult, to the person of another student, staff member or guest of the University.

N. Sexual harassment or abuse to the person of another student, faculty, staff member or guest of the University.

O. Failure to comply with the directions of institution officials, including the rules of this Code of Conduct and any other regulations which may be adopted.

P. Obstructing access to any campus building or other facility and unregistered, unreserved, unauthorized entry, attempted entry or occupation of any University meeting facilities; teaching, research, recreational and athletic facilities; classrooms; public or common indoor or outdoor areas; faculty offices or components of the University physical plant or property.

Q. Interfering with campus public safety officers while they are acting in performance of their duties on the college premises, failure to produce appropriate form of identification upon request, or intentionally ignoring citations issued by the campus public safety officers.

R. Any behavior which violates any other University regulation or policy, and any action which endangers or tends to endanger the safety, health or life of any person.

XII. Sanctions

The various penalties for established violations are set forth below. If a student is found guilty, one or more of the limited sanctions may be imposed by the Dean of Students or designee. Even when remedies are available through local law enforcement bodies, the University, through appropriate means, may choose to impose its own disciplinary sanctions.

A. Warning: Written or oral notice that continuation or repetition of conduct found wrongful may be cause for further disciplinary action. A warning may become part of the permanent record file. A warning may be taken into consideration for future disciplinary actions.

B. Censure: A written reprimand which becomes part of the student's record which may be taken into consideration in any future disciplinary action.

C. Dean of Students Probation; Social Probation: May include exclusion from participation in extracurricular activities and/or the suspension of campus privileges, and the restriction of use of University facilities for a specified period of time.

D. Fines: A penalty intended as a punitive deterrent. Fines are also applied for the violation of stipulated regulations. Fines may also cover the costs of replacing University property damaged or stolen by any student. The payment of a fine by a student shall in no way limit the right of the University to seek restitution through civil proceedings.

E. Community Service: The assignment of tasks which foster community welfare as well as student development.

F. Other Penalties: May include limited access to University facilities, legal action or appropriate tasks to compensate for wrongdoing with emphasis on restitutive activities. May be required to participate in rehabilitative activities.

G. Suspension: Exclusion from participation in all University programs, academic and extracurricular, for a specified period of time. Refunds, if applicable, will be consistent with University policy.

H. Dismissal: Permanent exclusion from the University.

XIII. The Hearing Process

A. Jurisdiction: The Office of the Dean of Students has sole responsibility and jurisdiction for campus discipline.

1. The Campus Standards Committee shall be the principal hearing body assigned by the Dean of Students with jurisdiction to hear charges of student misconduct.

a. During the fall of each academic year, a Campus Standards Committee is established on each campus. (XIV. A. 1.)

b. When the Campus Standards Committee is not functioning, cases are heard only by the Dean of Students or the Dean's designee.

2. The Campus Standards Committee shall have the authority to prescribe supplementary rules of procedure consistent with the requirements contained herein.

3. Special programs such as Wroxton, and Ft. Monmouth, etc., which by virtue of their structure and program preclude a campus standards process will have the process waived in lieu of a process determined by the Director of the program and approved by the Vice President for Student Affairs and which will insure the rights of the student through reasonable due process.

B. In all disciplinary matters, a representative of the Office of the Dean of Students shall make a preliminary investigation of the alleged charges. If it is determined that the charges have no substance, they will be dropped and the involved parties will be so informed.

C. If the charges have been determined to have substance, a student may plead either innocent or guilty. A student will enter a written plea of innocence or guilt and may do so with explanation.

D. The Dean of Students retains at all times the right to assign a case to the Campus Standards Committee.

E. If a student pleads guilty, the penalty, depending on student choice, may be determined by having the Campus Standards Committee hear the case and subsequently recommend a penalty to the Dean of Students, or by having the case reviewed and the penalty imposed by the Dean of Students or Dean's designee. If the Dean believes it to be advisable, the Dean may consult members of the Campus Standards Committee in determining the penalty.

F. If a student pleads not guilty, the student may choose to have the case heard by the Campus Standards Committee which makes judgment on the matter being considered and recommends action to the Dean of Students. Or, the student may request to have the Dean of Students or Dean's designee hear the case, make judgment about it and determine appropriate action.

G. Initiation of Disciplinary Proceedings

1. Charges of student misconduct may be filed against a student by any member of the University community.

2. Charges shall be filed in writing with the Office of the Dean of Students. Upon filing, the Office of the Dean of Students shall notify and inform the accused student of the procedure to be followed.

3. If the preliminary investigation indicates sufficient evidence to warrant penalties beyond a warning, the Dean of Students or Dean's designee shall have prepared and served on the person charged a complaint setting forth the specific nature of the complaint.

4. An action before the Campus Standards Committee shall commence by notification from the Office of the Dean of Students to the chairperson of the Campus Standards Committee.

H. Hearings: Campus Standards Committee

1. Students against whom charges are being lodged shall be notified of the date, time and place of a hearing, in writing, delivered in person or by certified mail, by the Office of the Dean of Students or the chairperson of Campus Standards Committee. If all reasonable efforts to contact a student have failed, the Committee and/or Dean may proceed with a hearing five business days from when the initial effort to contact the student was made.

2. If, after due notice of the complaint and the date, time and place of hearing, the accused fails to appear and the majority of the Campus Standards Committee is satisfied that the accused had appropriate notice and no valid excuse for non-appearance, the Campus Standards Committee may then hold the hearing without the student being present.

3. Recommendations by the Campus Standards Committee which are to be submitted to the Dean of Students shall be determined in all cases by a simple majority vote.

4. The Chairperson of the Campus Standards Committee shall insure that there are enough committee members to conduct a hearing. The Chairperson shall ascertain, prior to any hearing, whether any member(s) of the Campus Standards Committee has a particular bias or ethical conflict with the accused or accuser which would prevent rendering an objective recommendation. If such an ethical conflict or personal relationship exists then the Chairperson will request the Campus Standards Committee member to excuse himself/herself from the case.

5. The Chairperson shall inform the accused of the charges and will ask the accused for a plea to each charge. The accused may plead guilty or not guilty to each specific charge. (See XII. C.)

6. Any witness may be cross-examined by any party to the action and by any member of the Campus Standards Committee.

7. All information upon which the decision will be based must be introduced at the hearing.

8. The Campus Standards Committee will only hear or review evidence which is germane to the current charges against the student. Prior incidents that have been dealt with by the Campus Standards Committee are generally not relevant in the finding of innocence or guilt; however, if a verdict of guilt is rendered, the Dean of Students or designee shall inform the Committee of prior incidents where the student was found guilty. This information will be taken into consideration in the recommendation of sanctions.

9. Hearings will be closed. Students may not tape the hearing. A nonlegal adviser may be present as well as witnesses who will be called on an individual basis. (See XIII. J. 5.)

10. The defendant has the right to remain silent without prejudice to his case.

11. The members of the Campus Standards Committee will then either retire to another room or clear the hearing room for the purpose of deliberation. The Campus Standards Committee shall issue a written report determining findings of fact and conclusions as to the validity of the charges. When appropriate the Campus Standards Committee will recommend sanctions to the Dean of Students.

12. The defendant will be notified of the Dean's decision with respect to the case. This will be done in writing and delivered in person or by certified mail within 10 business days of the date on which the Campus Standards Committee's recommended action is forwarded to the Dean of Students for consideration.

13. The Dean of Students shall notify the Chairperson of the Campus Standards Committee, in writing, as to the final disposition of the case.

14. The Office of the Dean of Students will notify appropriate departments as to the details of the sanction to the extent same is required to enforce the sanction.

I. Administrative Suspension

The University, through the Dean of Students, reserves the right to suspend any student whose behavior indicates that his/her continued presence constitutes a clear and convincing danger to property, to others or to himself/herself. Should the continued extracurricular activity of a student be deemed to be deleterious to the basic welfare of the campus community, the student may be suspended. In all such situations, the following shall apply:

1. The student will be notified in writing of the suspension and the reason for the action.

2. The student will be provided a preliminary hearing with the Dean of Students or designee prior to the suspension taking effect unless such a hearing is impossible or unreasonably difficult to arrange.

3. The student may be required to undergo

a physical or psychological evaluation, the results of which may be used in subsequent hearings.

4. In the event of a violation of a prior imposed sanction, the Dean of Students shall have the authority to continue the sanction or take other appropriate measures, pending the outcome of a new hearing.

5. A hearing will follow an administrative suspension in accord with procedures established for a hearing.

J. The Rights of the Accused

1. The accused has the right to be present at his/her hearing.

2. The accused has the right to be informed of the evidence against him/her.

3. The accused has the right to have adequate opportunity to rebut the evidence.

4. The accused has the right to present evidence on his/her behalf.

5. The accused has the right to the assistance of an adviser of his/her choice. The adviser may not be an attorney; or any individual who has had any prior legal training/education.

6. The Campus Standards Committee shall at all times follow procedures which will assure a fair and impartial hearing. The hearing shall be conducted in such a manner as to do substantial justice and shall not be unduly restricted by the legal rules of procedure, evidence and/or discovery.

7. All hearings shall be private.

8. If two or more individuals are accused within the same complaint, individual hearings shall be permitted when requested by an accused.

K. Appeal

1. Students must notify the Dean of Students in writing by 5 p.m. the following business day, after receiving a sanction letter from the Dean of Students of his/her intention to appeal.

2. The student must meet with the Dean of Students or designee by 5 p.m. the following business day, after receiving the sanction letter from the Dean of Students, to request a stay of execution of the Dean's sanction. A decision by the Dean of Students will be made available to the student by 5 p.m. the following business day. It is the student's responsibility to pick up the Dean of Students' decision in the Dean of Students' Office that day. If the student does not pick up the decision to grant a stay of execution, the initial sanction automatically stands.

3. The completed appeal must be received by the Vice President of Student Affairs within five business days of the receipt of the Dean's sanction letter. This appeal must be in writing.

4. An appeal must be based upon new evidence, procedural violations or the application of inappropriate sanctions.

5. Upon receipt of the appeal, the Vice President for Student Affairs or designee shall advise the Dean of Students that such an appeal has been filed, and the Dean shall then make the written report of the proceedings available to the appeals review officer.

6. The Vice President for Student Affairs will adjudicate an appeal within 10 working days from receipt. A decision, in writing, will then be forwarded to the student and the Dean of Students.

XIV. The Campus Standards Committee

A. Membership of the Campus Standards Committee

The number of members on a Campus Standards Committee may differ from campus to campus, as may the process of selection, however, committee membership consists of an appropriate number of students, faculty and professional staff designated by the Dean of Students.

B. Procedures of the Campus Standards Committee

1. The case against the accused shall be evaluated on the basis of all the evidence and facts presented.

2. The Campus Standards Committee shall make all necessary rules of evidence, in the exercise of which responsibility the following guidelines shall apply: Evidence must be relevant and of the kind upon which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law, court or statutory rule which might make improper the admission of evidence over objection in civil or criminal actions.

3. Confidentiality shall be maintained and cases are to be discussed only while the Campus Standards Committee is in session.

4. A record of the hearing shall be kept on tape or in writing. The record will be maintained in the Office of the Dean of Students.

5. Records of a hearing will be maintained for a period of seven years commencing upon the accused's graduation or severance from the University.

6. The case against the accused shall be presented first by the Chairperson of the Campus Standards Committee. The Chairperson shall offer evidence to the charges being considered. Witnesses may be called and evidence introduced.

7. Upon completion of the presentation, the accused shall present the defense.

8. The Campus Standards Committee Chairperson and the accused, or the adviser, if desired, may offer summations.

III. SELECTED LEGAL DECISIONS

III. SELECTED LEGAL DECISIONS

There are many judicial decisions which discuss the constitutionality and the supportability of different forms of discipline meted out to students who violate university rules, codes of conduct and regulations. Many of these decisions focus on the Fourth and Fourteenth Amendments to the Constitution, which, very simply stated, protect persons from unreasonable search and seizure, and entitles them to due process.

Questions posed in these cases include the following: What constitutes procedural due process in an internal disciplinary hearing? Does the standard of review depend upon the nature of the charge? If the allegation encompasses a criminal activity, is the standard of proof in an internal proceeding probable cause? Under what circumstances can a student's room be searched? What is the weight accorded written rules and policies known to the student?

The cases described in this section have been included to illustrate courts' varying treatment of discipline dispensed by universities as a result of non-academic behavior. The discipline includes suspension, expulsion, and reassignment. The cases all discuss Constitutional issues of due process and/or unreasonable search and seizure. All involve issues which continue to plague administrators as the relationship with students continues to evolve and as students become more litigious. If there is a theme at all, it is to be cautious and follow Constitutional mandates when a "criminal" act is suspected or charged.

Kelleher v. Flawn contains employment issues related to the unilateral reassignment of teaching duties of a graduate student. Kelleher raised due process questions about the reassignment and lost. *Morale v. Grigel* and *Smyth v. Lubbers* both involve possession of illegal drugs, but have entirely different results. The court in *Morale* found an improper search, but deems Morale to have been accorded due process, and consequently upheld the discipline. The court in *Smyth*, on the other hand, overturned the discipline, based in large measure on the criminal and serious nature of the charge. In *Gardenshire v. Chalmers*, which involves possession of a firearm, the court overturned the discipline of Gardenshire based on the failure of the University to give him procedural due process. *Edwards v. Board of Regents of Northwest Missouri State University* deals with a generally undisciplined and disruptive student, who is expelled. The court upheld the expulsion despite a failure by the University to follow its own procedures for dealing with discipline. The court noted that Edwards was not deprived of any constitutional rights. A recent case, *State of Utah v. Gregory T. Hunter*, concerns a student charged with vandalism. The student claims the evidence found in his room should be suppressed because no warrant was obtained. The appellate court disagreed, holding that the University has the authority to maintain a safe environment for students, and the students were warned in advance that more vandalism would result in a search of their rooms.

Keith E. Gardenshire

v.

E.L. Chalmers, individually and as Chancellor of the University of Kansas, et. al.

326 F. Supp 1200

Decided February 1, 1971

Keith Gardenshire was a student at the University of Kansas until he was notified by letter on December 10, 1970 that he was suspended for carrying a firearm on campus on December 7, 1970. His suspension continued in effect until the date of this decision, February 1, 1971. Gardenshire was advised that, upon request, he had the right of review of his suspension by the board that handles disciplinary matters. The University rule prohibiting the carrying of firearms on campus states that any unauthorized possession of a firearm "will result in immediate dismissal from the university." The notice was published in the campus newspaper. In a state criminal complaint, Gardenshire was charged with carrying a concealed weapon and the attempted murder of a fellow student. Gardenshire alleges that he was suspended without proper notice of the charges or a hearing, both of which violate his Fourteenth Amendment right to procedural due process.

The principle issue in this case is Gardenshire's individual right to continue his education versus the University's obligation to protect other students from potential harm. The court found that he did not receive notice of the grounds of the charge, was not informed of the witnesses or evidence against him and was not afforded the opportunity to defend himself during a hearing. That he could request a review of the decision was not sufficient. A hearing should have been scheduled simultaneously with service of a written notice of temporary suspension pending the outcome of the hearing. The court also found that the University had a duty to take immediate action against a gun-carrying student. During the hearing, Gardenshire presented his defense and showed cause why his suspension should not be permanent.

The court set aside Gardenshire's suspension as of the date he was served with the notice and ordered that his reinstatement continue until a final determination is made regarding his alleged misconduct. In short, the court found a lack of due process.

Jefferson David Edwards, Jr.
v.
The Board of Regents of Northwest Missouri State University, at. al.

397 F. Supp. 822

July 8, 1975

Jefferson Edwards was a student at Northwest Missouri State University until he received an order of expulsion on March 6, 1973. He had previously been suspended pending a formal hearing on the charge of "persistently irresponsible behavior" including disrupting classes, disrespectful conversation, abusive language and writing vulgar letters. Edwards received a conduct warning from the Student Court on March 2, 1972. He alleged that his Fourteenth Amendment due process rights were violated.

The parties to this suit agreed that Edwards had received adequate written notice, that he was given a hearing during which he presented his position, was not denied representation by an attorney and did not request one.

The Student Handbook states that all students accused of violating University rules should have a hearing before a disciplinary committee comprised of faculty and students. Edwards was exonerated of certain charges by the Student Faculty Committee, only to be notified that a second hearing was to be held before the Board of Regents, which includes no students. Edwards received personal notice of his expulsion immediately following the second hearing. The Board of Regents had never expelled a student without the recommendation of the Student Faculty Discipline Committee.

Edwards alleged, and the court concluded, that the University did not follow its own procedures for disciplinary action. However, this alone did not deprive Edwards of any constitutional rights, and the expulsion was upheld.

Kathleen Kelleher v. Flawn, et. al.

761 F. 2nd 1079

June 3, 1985

Kathleen Kelleher was a graduate student and assistant instructor at the University of Texas when she was reassigned to a non-teaching position. She claims that this action violated her constitutional rights of freedom of expression and freedom from deprivation from property interests -- in this case, the benefits of her position as a graduate student instructor.

In 1980, a college dean received complaints from two students concerning the teaching methods utilized in Kelleher's American Government class. An investigation ensued and the acting department chair concluded that all complaints were "without substance." The Vice President for Academic Affairs, however, requested that the investigation continue, and when the new department chair arrived, he met with Kelleher to discuss the complaints. Faculty guidelines specify that assistant instructors should utilize course syllabi prepared by full faculty members instead of preparing their own. Kelleher, however, had created her own syllabus, which did not include the use of a Texas government textbook, which the new department chair, Cnudde, considered mandatory. Ms. Kelleher described the meeting between herself and Cnudde as amicable. Cnudde, on the other hand, claimed Kelleher was belligerent and unwilling to comply with the regulations. At the close of the meeting, Cnudde told Kelleher that she would not be teaching Government in the Fall.

Following the meeting, Kelleher received an appointment as assistant instructor without teaching responsibility. She would only be permitted to assist a faculty member. She accepted, but later withdrew her acceptance, and filed a grievance claiming she had received a demotion. The Grievance Committee found that she was denied due process and should be paid for the Fall semester. The president of the University rejected the Committee's finding, stating that graduate students are not entitled to a hearing when they contest their assignment.

Kelleher filed suit against several University officials. The district court dismissed her suit, stating that there was no First Amendment violation, no due process violation, and her reassignment was not "constructive termination." Kelleher appealed.

The appellate court affirmed the lower court's decision, agreeing that Kelleher's uncooperative behavior in the meeting with Cnudde, and not her in-class activities, were the basis for the change in position.

Charles C. Smyth and Greg Smith

v.

Arend Lubber, President of Grand Valley State College, et. al.

398 F. Supp. 777

June 27, 1975

College officials performed warrantless searches of several dorm rooms and found marijuana. The students whose rooms were searched filed suit alleging improper searches and potential due process violations. The All College Judiciary found the plaintiffs in this action guilty of possession of marijuana and suspended them.

The College's "Room Entry Procedures" provide that "student rooms may be entered by residence hall staff members if -- (c)ollege officials have reasonable cause to believe that students are continuing to violate federal state or local laws or College regulations...and county and state officials may enter a student's room only after a search warrant has been presented." Two county Deputy Sheriffs participated in the warrantless searches.

At the hearing before the All College Judiciary, both students were represented by counsel. The hearings resulted in a suspension of one year for Smith and two years for Smyth. No criminal charges were filed against either student.

The court questioned the validity of the College's "Room Entry Procedures." It described a student's dorm room as his "home," and found that "he has the same interest in the privacy of his room as any adult has in the privacy of his home." The court also found the searches of the rooms were "hostile and intrusive." The fact that a "Residence Hall Contract" was signed does not mean a student has consented to "any search." Therefore, the students did not waive their Fourteenth Amendment right to privacy.

The court held that the student's convictions "were based on constitutionally inadequate standards of proof" (substantial evidence) and accordingly, the suspensions should be dropped. The preferred standard in a disciplinary hearing which involves a criminal charge, the effect of which is serious and potentially permanent, should be "clear and convincing evidence."

James J. Morale
v.
Michael Grigel, et. al.

422 F. Supp. 988

November 9, 1976

During a series of searches for a stolen stereo, marijuana seeds were discovered in James Morale's room. Morale admitted the Resident Assistant to his room, assuming that he had the authority to search his room. He was unaware of his right to resist such a search. Morale alleges that the searches violated his Fourth and Fourteenth Amendment rights. The court held that searching a student's room is unreasonable under the Fourth Amendment, which protects against unreasonable searches, unless "the search furthers its functioning as an educational institution," i.e. checking for health hazards, or in the case of an emergency such as a fire. Further, the "Student Resident Contract" does not constitute consent to unlawful searches, since it only mentions that school officials may enter dorm rooms for health and safety inspections.

The court found that, although the search of Morale's room was improper, he has been accorded due process. The exclusionary rule, which prohibits the admission of unlawfully obtained evidence (in this case, the marijuana seeds) in a criminal trial court, does not apply in a student disciplinary hearing. The court states that the Supreme Court has "intentionally left students without a remedy for violations of Fourth Amendment rights."

State of Utah
v.
Gregory T. Hunter

831 Pacific Reporter 1033

April 21, 1992

Gregory Hunter was a student at Utah State University and was residing in a campus dormitory when several incidents of vandalism occurred on his floor. University officials met with the students occupying the floor and notified them that if the vandalism continued, searches of each room would be conducted in accordance with their residence hall contracts. The pertinent clause in the contract reads as follows: "University officials reserve the right to enter and inspect residence hall rooms at any time. Inspections will occur when necessary to protect and maintain the property of the University, the health and safety of its students, or whenever necessary to aid in the basic responsibilities of the University regarding discipline and maintenance of an educational atmosphere. In such cases, effort will be made to notify the resident(s) in advance and to have the resident(s) present at the time of entry."

A few weeks after the meeting, additional damage occurred and the Director of Housing, among others, conducted a warrantless search. At each room, they knocked on the door, identified themselves, and then searched the room. If no one was present, a custodian's pass-key was used. When Hunter's room was searched, stolen property was found. Hunter proceeded to the office of the University police to complain about the search. While there, he admitted to stealing the items found in his room.

The lower court granted Hunter's motion to suppress the evidence found in his room. In this appeal, the court found that the "search was a reasonable exercise of the University's authority to maintain an educational environment." Supporting facts include the meeting at which students were warned of the potential search. Accordingly, the court ruled that the stolen items found in Hunter's room should not be suppressed as evidence.

IV. SELECTED LAW REVIEW AND LEGAL PERIODICALS

University Disciplinary Process: What's Fair, What's Due, and What You Don't Get

James M. Picozzi†

Public schools, the Supreme Court has repeatedly said, are vitally important "in the preparation of individuals for participation as citizens."[1] Universities perform the vital function of teaching the "fundamental values necessary to the maintenance of a democratic political system."[2]

Within these training grounds for citizenship, school officials play a complex and virtually paradoxical role: they must maintain order among and authority over the same students to whom they must teach the values of individual liberty. Their actions, explained Justice Jackson, must not undercut the lesson:

> Boards of Education . . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[3]

Thus, the Supreme Court vigorously defended the constitutional rights of students in public schools, even during the difficult 1960's.[4] That protection reached its apogee in *Goss v. Lopez*,[5] a case involving a ten-day suspension from a public high school. "At the very minimum," wrote Justice White for the majority, "students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing."[6] Justice White went on to outline the necessary procedure for a ten-day suspension from public high school, but was careful to explain that the procedure was tailored to the specific facts in *Goss*. A longer suspension or an expulsion, he wrote, "may require more formal procedures."[7]

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† As a former defendant in a student disciplinary case, I have strong feelings about many of the issues discussed in this Note. I do not deny a degree of bias, but I believe that bias to be more than outweighed by the special insight my experience has given me into these issues. I ask only that the reader consider the ideas on their merits.

Cases involving the University of Michigan receive lengthy treatment in this Note, not because I harbor a special animosity towards it, but because it has produced three significant cases in the area: Regents of the Univ. of Mich. v. Ewing, 106 S. Ct. 507 (1985), because it is the most recent pronouncement by the Supreme Court on the rights of students at public universities; Crook v. Baker, 584 F.Supp. 1531 (E.D. Mich. 1984), because of the unusual detail in which Judge Taylor describes the case history; and Picozzi v. Sandalow, 623 F. Supp. 1571 (E.D. Mich. 1986), because it raises many as yet unresolved issues and because I have special knowledge of many of the "off-record" facts.

[1] Ambach v. Norwick, 441 U.S. 68, 76 (1979); *accord* Board of Educ. v. Pico, 457 U.S. 853, 864 (1982).

[2] *Ambach*, 441 U.S. at 77.

[3] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

[4] *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1968) (suspension of three public high school students for wearing black armbands in protest against United States involvement in Vietnam held unconstitutional). For many years thereafter, no student rights opinion by any court

To this day, however, the Supreme Court has never specified what those more formal procedures should be or when they should be required.[8] Indeed, far from filling in the interstices of *Goss*, the Court instead has carefully avoided any further definition of the scope or extent of due process protections in university disciplinary actions. Twice, for instance, the Court has declined to reach the question of whether students at public universities have a property or liberty interest in their educations.[9] Such a holding would have triggered the due process requirements of the Fourteenth Amendment and placed public university students squarely within the dictates of *Goss*.[10] In both cases, though, the Supreme Court merely "assumed" the existence of a property or liberty interest for the

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was complete without quoting Justice Fortas's statement that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id*. at 506.

[5] 419 U.S. 565 (1975).

[6] 419 U.S. at 579. The *Goss* opinion did specify that notice must inform the student of "what he is accused of doing and what the basis of the accusation is," *id*. at 582, and that the hearing must provide the student with "an opportunity to present his side of the story," *id*. at 581. Moreover, by definition, a due process hearing requires an impartial decisionmaker. *See infra* note 43. Since *Goss v. Lopez*, it has been well-settled that these bare elements of process are due a student before an expulsion or any suspension that is not de minimis.

[7] *Id*. at 584.

[8] Additionally, *Goss* held that "as a general rule notice and hearing should precede removal of the student from school," but allowed that the student might be removed first where his "presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process." *Id*. at 582. Again, however, the Court has never specified what dangers justify immediate suspension.

[9] Regents of the Univ. of Mich. v. Ewing, 106 S. Ct. 507 (1985); Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978); *see infra* note 11.

[10] Although some different values are at work at the high school level than at the university level, similar constitutional *theories* apply to both. It does not matter that attendance at high school is required by state law, whereas attendance at a university may be deemed a privilege. Whether a benefit is characterized as a "right" or a "privilege" has no constitutional significance. *See* Graham v. Richardson, 403 U.S. 365, 374 (1971). The only relevant inquiry is whether the student's interest in remaining in school falls "within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). If it does, then process is due a student before dismissal and the dictates of *Goss* apply. *See infra* Section I.

The amount of process due increases according to the interest the student has at stake. Mathews v. Eldridge, 424 U.S. 319 (1976). As dismissal from a university implicates a much greater interest than dismissal from a high school, not only should the degree of process increase, but so should the degree of concern over erroneous deprivations. *See infra* Sections I and IV.

purposes of argument[11] and then proceeded to decide each case on narrower grounds.

While the Supreme Court equivocated, the lack of a national procedural standard spawned litigation—as universities were free to call any type of teacher-student meeting a hearing, and students were forced to bring suit to obtain fair procedure. Ruling on these cases, however, the lower federal courts did not equivocate. Consistently, they found public university students *do* hold property and liberty interests in their educations and, consequently, all applied the minimal *Goss* standard of "*some* kind of a hearing" before expulsion.[12] Yet, without a ruling by the Supreme Court specifying how much process a student was due, the district courts applied *Goss* unevenly.

Recently, the Supreme Court has become active again, deciding several new cases involving the application of constitutional standards to public schools.[13] Rather than press ahead to fill the gaps left by *Goss v. Lopez*, though, the Court has instead begun a retreat from its former strong defense of students' rights. The question has become how much further the Court will go in restricting students' rights and, more importantly to the subject of this Note, how far will those restrictions be extended to include students at public universities? The face of public education has changed and, as the Supreme Court itself has raised the question time and again, one also wonders what a reduction of student rights will teach young citizens about the democratic political system.[14]

This Note explores the dangers in allowing public university officials unbridled authority to suspend or expel students for disciplinary reasons.[15] Section I examines the student's interests in not being arbitrarily dismissed from a university and demonstrates how those interests rise to the level of "property and liberty" within the contemplation of the Fourteenth Amendment. Section II examines the private interests of individual university administrators—as opposed to the interests of the institutions themselves—and how those interests can conflict with the legitimate interests of the student in disciplinary situations. Section III examines how the administrator's private interests infect the disciplinary process, even when the interested administrator is excluded. Section IV explores the difficulties a student can face when a university uses unfair procedures. Section V suggests a framework for disciplinary procedures which would balance the student's interests against the university's legitimate interests in maintaining order.

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[11] *Ewing*, 106 S. Ct. at 512 (even if student had property interest giving rise to substantive due process right against arbitrary state action, record of student's academic expulsion disclosed no arbitrary action); *Horowitz*, 435 U.S. at 91-92 (even if academic expulsion could be reviewed under arbitrary and capricious standard, student made no showing of arbitrariness and capriciousness).

[12] *See infra* Section I.

[13] Bethel School Dist. v. Fraser, 106 S. Ct. 3159 (1986) (upholding suspension of high school student for student election speech that was sexually suggestive, but not explicit); New Jersey v. T.L.O., 469 U.S. 325 (1985) ("reasonable grounds," not "probable cause," is standard for in-school search of student's locker, belongings, or person).

[14] In striking down the arbitrary expulsion of several students from the Alabama State College in 1961, the United States Court of Appeals for the Fifth Circuit wrote the following:

> In the disciplining of college students there are no considerations of immediate danger to the public, or of peril to the national security, which should prevent the [Alabama State Board of Education] from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense. Indeed, the example set by the Board in failing so to do, if not corrected by the courts, can well break the spirits of the expelled students and of others familiar with the injustice, and do inestimable harm to their education.

Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961).

[15] The Supreme Court distinguishes between academic and disciplinary dismissals, deferring in the former case to the professional judgment of educators. Justice Rehnquist explained:

I. THE PRIVATE INTEREST: WHAT THE STUDENT STANDS TO LOSE

In determining what rights a student has against arbitrary dismissal, one must first ask whether the nature of the student's interest falls "within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."[16] If it does, then process is due the student before that interest can be extinguished.[17] Despite the Supreme Court's hesitancy,[18] lower federal courts have consistently held that dismissal from a public university implicates property and liberty interests.[19] While the

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> Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.

Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978). Consequently, the Court ruled that it would not require as much procedure in cases of academic dismissal as it would in cases of disciplinary dismissal. *Id.* at 86. Recently, in Regents of the Univ. of Mich. v. Ewing, 106 S. Ct. 507, 514 (1985), the Court reaffirmed that distinction.

[16] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[17] How *much* process depends upon the balance of three factors identified by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The first factor is the private interest to be affected—here, the student's interest in continuing his education. The second factor is the risk of erroneous deprivation under the present procedures and the probable value of additional procedures. The third and final factor is the government's interest, including the function of the agency involved and the burden of providing additional procedures. If the private interest outweighs the government interest, and additional procedures would avoid mistakes, then greater process is due.

At the outset, one must acknowledge the legitimate interests of the government, in the form of the university, in maintaining discipline. *See infra* Section V. This Note assumes the legitimate weight of the university's interests as a backdrop to its discussions and, instead, goes on to explore two other points about the *Mathews* balance. First, one must be careful to separate the private interests of university officials from the legitimate interests of the university itself. Currently, the former are allowed to tilt the balance, making erroneous deprivations all but inevitable. Second, even when considering the full weight of the university's legitimate interests, the countervailing weight of the student's interests are so overwhelming that, under the *Mathews* balance, much more process is due students than they currently receive.

[18] *See supra* notes 9-11 and accompanying text.

[19] *See, e.g.*, Stoller v. College of Medicine, 562 F. Supp. 403, 412 (M.D. Pa. 1983), *aff'd without opinion*, 727 F.2d 1101 (3rd Cir. 1984); Greenhill v. Bailey, 519 F.2d 5, 7 (8th Cir. 1975);

reasoning of the lower courts is conclusory,[20] such a finding seems inescapable under the Supreme Court's own decisions.

A. *A Student's Property Interest*

The Fourteenth Amendment does not create interests in property. Rather, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits."[21] In *Goss v. Lopez*, for example, the Court found that a property interest in attending school had been created by an Ohio statute which required attendance for persons between the ages of six and eighteen.[22] In the employment context, the Court has found property interests in continued employment to have been created by term contracts,[23] tenure,[24] and even implied promises.[25] Indeed, in *Board of Regents v. Roth*,[26] the Court explained that any basis for legitimate reliance may create a property interest:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.[27]

Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975); Crook v. Baker, 584 F. Supp. 1531, 1554 (E.D. Mich. 1984); Hart v. Ferris State College, 557 F. Supp. 1379, 1382 (W.D. Mich. 1983); Hall v. University of Minn., 530 F. Supp. 104, 107 (D. Minn. 1982); Ross v. Pennsylvania State Univ., 445 F. Supp. 147, 152 (M.D. Pa. 1977).

[20] *See, e.g.*, Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975), where the court wrote:

> We have no difficulty in concluding that in light of *Goss*, . . . where the Supreme Court recognized a *property right* in public school students that certainly such a right must be recognized to have vested with [the university student], and the more prominently so in that she paid a specific, separate fee for enrollment and attendance.

See also Hart v. Ferris State College, 557 F. Supp. 1379, 1382 (W.D. Mich. 1983) ("It is undisputed that the threat of suspension or expulsion implicates plaintiff's property and liberty interests in public education and reputation.").

[21] Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[22] 419 U.S. 565, 573-74 (1975).

[23] Wieman v. Updegraff, 344 U.S. 183 (1952).

[24] Slochower v. Board of Educ., 350 U.S. 551 (1956).

[25] Connell v. Higginbotham, 403 U.S. 207 (1971).

[26] 408 U.S. 564 (1972).

[27] *Id.* at 576-77. Roth was a teacher at a state college with a one-year contract. At the end of the contract year, he was informed he would not be rehired. Roth brought suit, claiming a property interest in continued employment. The Supreme Court ruled he did not have a property interest because his employment contract had a specific termination date with no provision for renewal and, thus, Roth had no legitimate reliance in employment past the one year. Unlike a student who must explain why he leaves a university before graduating, *see infra* notes 38-40, the termination date in Roth's contract was its own explanation. Indeed, as there was never a mutual understanding that Roth would continue past the termination date, his situation is analogous to the student who *does*

Any university student in good academic standing has more than a "unilateral expectation" that, upon completion of the required course work, he[28] will receive his degree. By accepting tuition and providing instruction in return, the university forms a contract with the student[29] and gives substance to his expectation of graduation.[30] If the expectation were "unilateral," the university would not have enrolled the student at all.

B. *A Student's Liberty Interest*

In *Wisconsin v. Constantineau*, the Supreme Court stated that liberty interests subject to the protection of due process are present "[w]here a person's good name, reputation, honor or integrity is at stake because of what the goverment is doing to him."[31] Thus, in *Constantineau*, the Court held that it was unconstitutional for government officials to post the names of habitual drunkards in retail liquor outlets without first providing a hearing to those whose names it sought to post.[32] Increasingly, however, the Supreme Court has been reluctant to find these interests. In *Paul v. Davis*,[33] it held that not *every* defamation infringes sufficiently upon liberty interests to trigger procedural protection. Rather, stigma must be accompanied by the deprivation of a right previously held under state law, or result in some other alteration of legal status, such as employment.[34] Using *Goss v. Lopez* as an example, the *Paul* Court explained that the stigma of the students' suspension was accompanied by deprivation of their property right under state law to attend school and, thus, a liberty interest was implicated as well.[35] More interestingly, though, the *Paul* Court explained its decision in *Wisconsin v. Constan-*

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graduate.

[28] All masculine forms appearing in nonfactual statements throughout this Note are used in their generic sense.

[29] *See, e.g.*, Behrend v. State, 55 Ohio App. 2d 135, 139, 379 N.E.2d 617, 620 (1979); Anderson v. Regents of the Univ. of Cal., 22 Cal. App. 3d 763, 769, 99 Cal. Rptr. 531, 535, *cert. denied*, 409 U.S. 1006 (1972).

[30] In a companion case to *Roth*, the Court further explained that a property interest will be found "if there are such rules or mutually explicit understandings that support [a] claim of entitlement." Perry v. Sindermann, 408 U.S. 593, 601 (1971) (teacher at state college could show legitimate claim of entitlement to continued employment through existence of rules and understandings fostered by state officials); *cf.* Nordin, *The Contract To Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J. COLLEGE & U.L. 141 (1980-1982) (arguing courts should find implied contract between university and student, and should look to provisions of college bulletins and academic traditions as some evidence of parties' reasonable expectations).

[31] 400 U.S. 433, 437 (1971).

[32] *Id.*; *see also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (United States Attorney General's designation, without notice or hearing, of three charitable organizations as "Communist" held actionable).

[33] 424 U.S. 693 (1976).

[34] 424 U.S. at 708-09.

[35] *Id.* at 710.

tineau[36] by saying that the alteration in Constantineau's legal status was "the right to purchase or obtain liquor in common with the rest of the citizenry."[37]

Dismissal from a university alters the student's legal status in many ways. If, for example, the student does hold a property interest in his education, then the *Paul* opinion's example of *Goss v. Lopez* makes clear that a student's liberty interest would be infringed as well. Similarly, if a contract does exist between the university and a student, then again the *Paul* opinion's example of terminating employment makes clear that breaking the contract through dismissal alters a student's legal status.

The most significant alteration of an expelled student's status, though, is his inability to re-enroll at another university. A subsequent university to which a student may apply *always* knows of the reasons for his prior dismissal.[38] Unlike an employee at will who may leave a position for a number of reasons,[39] educational institutions presume that, absent some academic or behavioral failure, a student continues at a university until he earns his degree. If he leaves without having earned his degree, the student must make an affirmative showing to any subsequent university to which he applies that he left the original university in "good standing" (i.e., that he did not fail academically and is free to re-enroll).[40] Consequently, to be dismissed from one university—in most cases and, in the highest circles of academia, in all cases—means the student can never again be a candidate for any degree. Unlike an employee at will who has been discharged, the disciplined student cannot simply return to his original position before enrollment. The employee may find a new job; the student cannot find a new university.

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[36] 400 U.S. 433 (1971); *see supra* note 31.

[37] 424 U.S. at 708.

[38] American Association of Collegiate Registrars and Admissions Officers, A Guide to an Adequate Permanent Record and Transcript 11 (1971) ("There are three major reasons for a student's leaving an institution prior to completion of his degree: (1) personal; (2) academic; (3) disciplinary."). Any institution to which a student may transfer will require an affirmative showing of which of these reasons caused the student to leave his prior institution. *See infra* note 40.

[39] *Cf.* Bishop v. Wood, 426 U.S. 341 (1976). Less than three months after *Paul*, the Court in *Bishop* suggested that procedural protection would be triggered even for an employee at will if his termination was accompanied by publication of the *reasons* for termination, as there was a danger potential subsequent employers would learn of those reasons. *Id.* at 348; *see also* Doe v. United States Dept. of Justice, 753 F.2d 1092 (D.C. Cir. 1985) (discharge from public employment for publicly disclosed, defamatory reasons infringes on protected liberty interest); Old Dominion Dairy Products v. Secretary of Defense, 631 F.2d 953, 962–63 (D.C. Cir. 1980) (although no protected property interest in government contracts, " 'stigmatizing' governmental defamation having an immediate and tangible effect" on contractor's business infringes upon protected liberty interest); Greenhill v. Baily, 519 F.2d 5, 8 (8th Cir. 1975) (dismissal from medical school accompanied by notification to Liaison Committee of Association of American Medical Colleges that student lacked "intellectual ability" infringed protected liberty interest).

[40] *See* American Association of Collegiate Registrars and Admissions Officers, Academic Record and Transcript Guide 21 (1984 rev.) (defining "good standing" as "eligible to continue at or return to an institution"). A student commonly does so not just through the use of a transcript from the first university, but also through a document commonly referred to as a letter of good standing. Without such a letter, most universities will not consider the student's application on its merits at all; in certain graduate-professional fields, such as law and medicine, no schools will accept a student who cannot produce such a letter. *See* Picozzi v. Sandalow, 623 F. Supp. 1571, 1576 (E.D. Mich. 1986). *Picozzi* illustrates how little courts have explored the implications of university expulsion. No other court had ever defined what a letter of good standing was, let alone the letter's constitutional significance. The defendant Terrance Sandalow, Dean of the Michigan Law School,

A more telling comparison, though, may be to *Wisconsin v. Constantineau*. If it altered Constantineau's legal status not to be free to purchase liquor with the rest of the citizenry—and, again, the *Paul* opinion says that it did—then *a fortiori* for a student no longer to be free to have his application to a university considered on the merits, which implicates a much broader interest, must also alter a legal status.

The economic wound inflicted by dismissal remains with a student for the rest of his life,[41] but often the wound goes deeper. In notorious cases, universities are wont to publicize apprehensions of offending students in order to placate the university community, irrespective of the emotional distress to the student or the irreparable harm to the student's reputation.[42]

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claimed a letter of good standing was analogous to a letter of recommendation and, thus, a student in good standing did not have an unqualified right to receive one. Rather, providing a letter lay in the Dean's absolute discretion. The District Court rejected Sandalow's argument. *Id.* at 1577.

Even at an institution that would not require a letter of good standing, a transfer applicant would likely be required to inform the school if he has been involved in any disciplinary procedures at his first institution, whether the student was found guilty of any infractions or not. The 1971 revision of the Academic Record and Transcript Guide listed as an "essential" item of a student's permanent record any suspension or expulsion of a student for disciplinary reasons. American Association of Collegiate Registrars and Admissions Officers, *supra* note 38, at 5-6. Although the 1984 revision dropped the student's disciplinary history as an "essential" item, many universities maintain the practice. Simply by omitting any statement of good standing or a disciplinary history, therefore, the student's first university can signal any second university to which he may apply that something is amiss and, consequently, provoke an inquiry.

The understanding among universities, that one will not accept a student in transfer unless his prior institution certifies that student as being in good standing, should be distinguished from the mutual understanding in Perry v. Sindermann, 408 U.S. 593, 601 (1971). A student's claim of entitlement to a letter of good standing derives from his relationship with his original institution; the mutual understanding among universities only demonstrates the student's injury in fact. In contrast, the mutual understanding in *Perry* actually created the teacher's claim of entitlement to continued employment. *See supra* note 30.

[41] The 1980 Census showed that men with four years of college earn an average of 38% more than those with only a high school diploma in the 25-34 year old age bracket; the difference rises to almost 64% by the time men reach age 65. Women with four years of college earn an average of 21% more than those with only a high school diploma in the 25-34 year old age bracket; the difference rises to almost 36% by the time women reach age 65. United States Bureau of the Census, Earnings by Occupation and Education, Series PC80-28B, 1 (May 1984).

Moreover, the difference in wages for those with and without a college education is increasing. *See* United States Bureau of the Census, Special Demographic Analysis, Education in the United States: 1940-1983, Series CDS-85-1 40-41 (July 1985).

[42] In the fall of 1983, there were more than 40 arson fires started on the campus of the University of Massachusetts. Most of these were small, mostly started in trash cans, bathrooms, and on bulletin boards. The problem received national attention, however. In December, the University charged that senior Yvette Henry had started all of the fires, based upon its suspicion that she had set

When one tallies the potential harm to a student—lifetime impairment of economic mobility, lifetime prohibition from higher education, and public belief that one has done something wrong, perhaps even committed a felony—the penalty for dismissal from a university for disciplinary reasons resembles the suspended sentence a felon might receive in a criminal court.

II. THE COMPETING INTERESTS: UNFAIR INFLUENCES ON THE DECISIONMAKER

Protection against wrongful deprivation of a student's property and liberty interests requires an impartial decisionmaker[43] and, thus, turns upon the integrity of the individual school administrator.[44] The courts presume good faith on the part of school administrators—but why they do so is unclear.

Judicial deference may, in part, stem from the paternalistic attitude that is explicit in the Supreme Court's decisions concerning secondary schools.[45] Deference also stems from the notion that universities enjoy a

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just one on another student's desk. The University accusation caused her to be criminally charged as well. Henry was arrested, held overnight in jail, suspended and barred from the university, and fired from her job as a resident assistant. (Eventually, she was allowed back on campus in the presence of an escort.) Additionally, the University announced it had caught the arsonist—an announcement which received national attention. However, Yvette Henry had not set any of the fires. All charges against her were dropped due to lack of evidence some three weeks later. Boston Globe, May 8, 1984, at 15, col. 1. Henry's experience illustrates the harm which university administrators—even well-intentioned university administrators—can cause due to a lack of expertise in the areas of investigation and procedural fairness.

Additionally, it shows how pre-hearing publication may place a university in the embarassing situation of having to recant, and even apologize for, its original position—thus creating another potential bias. *Cf.* Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583, 590 (D.C. Cir. 1970) (denial of due process for FTC Commissioner to make speech giving appearance that case was prejudged, as it has effect of "entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record.").

[43] In Marshall v. Jerrico, Inc., 446 U.S. 238 (1980), the Supreme Court explained why the due process clause entitles a person to an impartial decisionmaker:

> This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted perception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done."

Id. at 242 (citations omitted). For more in-depth commentary on the importance of an impartial decisionmaker, see Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975); Redish & Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455 (1986).

[44] "The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk or bias in administrative adjudication . . . . must overcome a presumption of honesty and integrity in those serving as adjudicators . . . ." Withrow v. Larkin, 421 U.S. 35, 47 (1975).

[45] *See, e.g.*, Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3165 (1986) ("Consciously

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special collegial environment.[46] Yet, once a student has been charged with an offense serious enough to lead to expulsion, it is unrealistic to think that the relationship between administrator and student does not become an adversarial one. Finally, deference stems from the belief, expressed in *Board of Curators of the University of Missouri v. Horowitz*[47] and *Regents of the University of Michigan v. Ewing*,[48] that teachers are the education experts and, therefore, a court should not replace a teacher's academic judgments with its own. Disciplinary judgments are not academic judgments, however, and teaching ability has little to do with competence to prosecute a dormitory rapist. Indeed, questions of fair procedure are the specialty of courts and it makes no sense for them, in a disciplinary setting, to defer to school administrators. Moreover, even if there were some correlation between teaching and procedural competence, the school administrator who does prosecute a dormitory rapist may not be a teacher at all.[49]

Individual university administrators are allowed to fill many roles, a number of which may conflict. For example, they fill the roles of both fund-raiser and disciplinary adjudicator, although refusing to punish an unpopularly vocal student might not be good public relations. Perhaps more telling, though, is a comparison to the criminal justice system. A university administrator may—and frequently does—fill all the roles of police (enforcing rules and identifying those who break them), prosecutor (deciding who should be charged for breaking the rules), judge (agreeing who should be charged for breaking the rules and deciding on fact-finding procedures) and jury (deciding if the individual is guilty as charged). By melding all of these roles in one person, these functions no longer check

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or otherwise, teachers . . . demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models.").

[46] *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 349-50 (1985) (Powell, J., concurring):

> The special relationship between teacher and student also distinguishes the setting within which schoolchildren operate. Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between school authorities and pupils. Instead, there is a commonality of interests between teachers and their pupils.

[47] 435 U.S. 78 (1978).

[48] 106 S. Ct. 507 (1985).

[49] *See, e.g.*, C. KERR, THE USES OF THE UNIVERSITY 28 (1972) ("As the institution becomes larger, administration becomes more formalized and separated as a distinct function."); *id.* at 42 ("Teaching is less central than it once was. . . .[giving] rise to what has been called the 'non-teacher'—'the higher a man's standing, the less he has to do with students.' ").

one another.[50] Any administrator who initially decides a student should be charged naturally has a predisposition to find him guilty of that charge.[51]

Although in other cases a melding of functions alone has not been held to violate due process,[52] the Court has recognized that such a melding creates a "substantial" constitutional issue requiring different solutions in different contexts.[53] Moreover, in no context has the Supreme Court ever been willing to ignore specific bias.[54]

Since *Dr. Bonham's Case*,[55] it has been axiomatic that no man may be a judge in a case in which he has an interest in the outcome and, indeed, that the mere likelihood of actual influence has been enough to disqualify a judge.[56] Of the potential biases to an adjudicator, financial interest is recognized as the greatest temptation.[57] Yet, the law currently tolerates a combination of potential biases, especially financial biases, on the part of university administrators that are not tolerated in any other context.

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[50] For example, consider the many hats worn by Roderick Daane, General Counsel of the University of Michigan, in Crook v. Baker, 584 F. Supp. 1531 (E.D. Mich. 1984). The University sought to rescind Crook's Master of Science degree some two years after his graduation. It charged Crook exactly as if he were still enrolled as a student. *Id.* at 1538-40. Daane, at various points in the process, acted as a supposedly neutral General Counsel in establishing the hearing's procedural rules, *id.* at 1536, 1539, 1545, as counsel for the Geology Department in its prosecution, as legal advisor to the Chairman of the panel deciding the case, as General Counsel to the Executive Board of the Graduate School when it heard the case on appeal, and finally as legal advisor to the University's Vice President when he presented the case on final appeal to the Board of Regents. *Id.* at 1541. Daane would selectively type in "Office of the General Counsel" at the top of his correspondence, depending on which role he wanted to play. *Id.* at 1552. At one point he dictated the hearing's procedural rules to Crook's attorney and stated that he had established them from his impartial role as General Counsel—yet, at trial, he claimed that the failure of opposing counsel to object to the rules constituted a "stipulation." *Id.* at 1542.

The Federal District Court wrote the following concerning Daane's conduct:

> It appears that Daane, once committed to the success of this adventure, subverted many other of the University's more compelling interests and paramount values to its accomplishment. As the charges advanced, he assumed the role most advantageous to their success, and was far less than candid with those others who were drawn into the problem and with this court.

Id. at 1551.

[51] *See In re* Murchison, 349 U.S. 133 (1955); *infra* note 64.

[52] *See* Withrow v. Larkin, 421 U.S. 35 (1975) (no violation of due process for medical committee which investigated allegations of physician's misconduct and recommended prosecution also to adjudicate charges); Richardson v. Perales, 402 U.S. 389, 410 (1971) (demand that administrative agencies separate functions "assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity").

[53] Withrow v. Larkin, 421 U.S. at 51:

> The issue is substantial, it is not new, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons. No single answer has been reached. Indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly unlikely.

The one specific example *Withrow* gave of how the problem has been addressed was Congress' adoption of the Administrative Procedure Act, 5 U.S.C.A. § 554(d) (West 1977), which provides generally that no employee engaged in investigating or prosecuting may also participate or advise in the adjudicating function. 421 U.S. at 52.

[54] In Withrow v. Larkin, 421 U.S. at 47, the Court stated:

> In pursuit of [an unbiased decisionmaker], various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.

See also Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1110 (D.C. Cir. 1985) ("[I]n *Withrow v. Larkin* the Supreme Court held that the mere combination of investigative and adjudicative functions does not automatically create a *presumption of bias.* The *Withrow* Court, however, assumed that judicial review of *actual bias* was available." (citation omitted)).

[55] 77 Eng. Rep. 646, 8 Coke 114a (C.P. 1610).

As higher education has undeniably become big business,[58] any decision by a university administrator may now implicate a pecuniary interest sufficient to meet ***Withrow v. Larkin***'s test of specific bias. University administrators must be concerned with fundraising and, ultimately, with public relations.[59] Frequently the ability of an institution to survive, let alone prosper, may depend upon its public image.[60] Moreover, a university ad-

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[56] Tumey v. Ohio, 273 U.S. 510 (1927). Tumey had been convicted of unlawful possession of intoxicating liquor by the town's Judge-Mayor. An Ohio statute provided that in the case of a conviction, the Judge-Mayor would receive his costs from the imposed fine. In a unanimous decision, the Supreme Court ruled the arrangement violated the due process clause of the Fourteenth Amendment. Significantly, the Court did not find that the Judge-Mayor *was* biased. Rather, it was enough that "possible temptation" existed and that the arrangement *appeared* unfair. *Id.* at 532; *cf. In re* Murchison, 349 U.S. 133, 136 (1955) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness.").

Moreover, a financial stake need not be as direct or positive as that in *Tumey*. *See* Ward v. Village of Monroeville, 409 U.S. 57 (1972) (trial of traffic offenses before mayor of village that received half its revenues from mayor's court violates due process clause).

[57] *See, e.g.*, Aetna Life Ins. Co. v. Lavoie, 106 S. Ct. 1580 (1986) (violation of due process for state supreme court justice to participate in proceeding against insurer, where justice had filed similar action against insurer, and decision enhanced legal status and settlement value of justice's own case); Gibson v. Berryhill, 411 U.S. 564 (1973) (denial of due process for state optometry board, consisting solely of optometrists in private practice for their own account, to adjudicate license revocation hearings against optometrists working through corporations, as effect of revocation would redound to personal pecuniary interest of board members).

[58] In the academic year 1984-85, corporations alone gave colleges and universities almost $1.6 billion. Total voluntary support exceeded $6.3 billion, up 12.9% from 1983-84 and 66.3% from 1979-80. *The Council for Financial Aid to Education Newsletter*, May 1986.

Even when broken down by individual schools, the figures are staggering. For the academic year 1984-85, voluntary support to UCLA totalled $62,591,722, to the University of Minnesota $66,203,892, and to the University of Illinois $70,698,392. *Id.*

[59] *See State Colleges Seeking Share of Philanthropic Pie*, N.Y. Times, July 29, 1986, at A1, col. 4 (describing competition among universities, and their officials, seeking to raise funds of hundreds of millions of dollars for individual institutions).

[60] "You can't run a first-class public university any more on public money alone," says Robert H. Huttenback, Chancellor of the University of California at Santa Barbara. *Id.*

In 1984, a commission organized by the Association of Governing Boards of Universities and Colleges specifically recognized the need to present a positive public image—to be achieved through greater autonomy in resolving internal disputes—and successful fundraising. The so-called "Kerr Commission" report stated that "new constraints, outside the control of higher education, bind the [university] presidents as never before in their freedom of action." *See* Association of Governing Boards of Colleges and Universities, Presidents Make a Difference: Strengthening Leadership in Colleges and Universities xii (1984). The Commission concluded that university presidents had to be given greater autonomy (or, as the Commission self-consciously put it, a greater "share" of the "governance") in order to attain certain necessary goals. *Id.* at 100. The goal it listed first was the "attraction of maximum financial resources to the institution," followed closely by the "persuasive representation of the institution to concerned external publics" and the "resolution of internal conflicts and misunderstandings." *Id.* at 100-101. The majority of the report's data came from interviews with more than 800 current or former university presidents, deans, chancellors, and ministrator's retaining his position may depend upon his ability to maintain the appearance of a tranquil campus to encourage prospective donors.[61] Consequently, faced with a student disturbance, a university administrator may not be thinking as a teacher or even an adjudicator; he is more likely thinking in utilitarian terms about what is best for the institution at the expense of individual justice,[62] or just as a bureaucrat protecting his job.

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administrators. Presumably, the goals the report identified were their goals.

[61] While no statistics can be compiled to show what correlation exists between insufficient fundraising and university administrators losing their positions, the Kerr Commission report makes clear both that fundraising has become an increasingly important concern of high-ranking university officials while, incidentally, the average term of a university president is shrinking. *Id.* at ix.

The comparison to the Administrative Procedure Act, utilized by the Court in Withrow v. Larkin, 421 U.S. 35, 52 (1975), is again illuminating. The APA at least attempts to shield from bias Administrative Law Judges who, like university administrators, must adjudicate individual claims against the agencies which employ them. The Act provides that ALJs "shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges" (5 U.S.C.A. § 3105 (West Supp. 1986)); that ALJs "are entitled to pay prescribed by the Office of Personnel and Management independently of agency recommendations or ratings" (5 U.S.C.A. § 5372 (West 1980)); and that an ALJ may be removed, suspended, or have his pay reduced "only for good cause established and determined by the Merit Systems Protection Board" (5 U.S.C.A. § 7521 (West 1980)).

[62] Several commentators have observed that utilitarian analysis is incompatible with any theory of due process that treats individual dignity as a serious, operative societal value. *See* Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. Pa. L. Rev. 111, 155 (1978) ("Aside from its questionable assumption that the societal cost of procedural protection can reliably be predicted, utility theory tends to minimize the value of the less quantifiable factors . . . by setting them off against more easily identifiable and often intuitively more compelling conceptions of public good."); Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 Harv. L. Rev. 592, 596 (1985):

> The inevitable result [of utilitarian policy analysis] is not only that "soft" variables—such as the value of vindicating a fundamental right or preserving human dignity—tend to be ignored or understated, but also that entire problems are reduced to terms that misstate their structure and that ignore the nuances that give these problems their full character.

To illustrate the problem in the context of the university setting, consider these hypotheticals:

- Students protest against a university investing in companies that do business in South Africa. The protests are covered extensively by the local media, including television scenes of student protesters criticizing the conduct of high-ranking university administrators. The president unilaterally suspends 150 students for taking part in the protests. Do the protesters constitute "an ongoing threat of disrupting the academic process"? Or, is the president merely afraid to have his university appear as something less than tranquil?
- At a highly competitive professional school, students steal one another's notes, sabotage each other's work, harass one another, and occasionally assault one another. Finally, one student is seriously injured by another in a fight. The incident draws a great deal of attention from local media and other institutions. The Dean of the school summarily suspends the student he believes to be the offender and then slaps a gag order on the school's employees, supposedly to protect reputations. Is the Dean simply acting responsibly to protect the school community? Or, is he afraid that outside scrutiny, generated by the one incident, will reveal a bad situation he allowed to develop? What if the injured student had previously complained to him about the attacker and the Dean had ignored it? What if the injured student's father is the president of the Alumni Association?
- A student is summarily expelled from a public university without any type of due process proceeding. He sues the President and the Dean for reinstatement, a public apology, and several million dollars in damages. The federal court orders that the student be given the due process hearing he should have had before being expelled. Can the university conduct an impartial hearing, knowing that to lose would expose both the President and the Dean to liability? Could anyone employed by the university be an impartial trier of fact?

Even without the bias of a pecuniary interest, a university administrator may be prejudiced simply by prior contact with the student or the matter in controversy.[63] Any time an adjudicator bases his decision on considerations outside the hearing, due process is violated, as there is no way for the defendant to challenge those extraneous considerations.[64] A university administrator not only may have had prior contact with the conflict upon which he is to rule, but also may easily have had a hand in its development—for example through some action of his that caused the conflict or by not adequately discharging his responsibilities and, thus, failing to resolve the conflict at an earlier point. Consequently, dealing fairly with a student—either in deciding whether to charge him or in deciding whether to find him guilty—may require the administrator to disaffirm his own previous judgments.

University disciplinary cases that involve potential suspension or expulsion will almost certainly involve the potential bias of either a pecuniary interest to the university or the administrator, or a significant prior contact on the part of the administrator. The probability of unfair bias from one of these sources is too high to be constitutionally tolerable and, thus, justifies a per se prophylactic rule of separation of functions.[65] At a mini-

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63. In Escobar v. State Univ. of N.Y./College at Old Westbury, 427 F. Supp. 850 (E.D.N.Y. 1977), the student had been formally charged under the college's disciplinary code, had submitted to a hearing, and had been sentenced by the college's Judicial Review Committee. The President of the college learned of the sentence after the fact and, "[b]ased on his own recollection of other events involving the [student]," he unilaterally imposed a harsher sentence—including immediate suspension and eviction from the dorms. *Id.* at 853. Additionally, the President conditioned the possibility of reenrollment upon the student submitting to psychiatric evaluation.

64. *See In re* Murchison, 349 U.S. 133 (1955). *Murchison* involved a state judge, empowered under state law to sit as a "one-man grand jury" and to compel witnesses to testify before him in secret about possible crimes, who charged two such witnesses with criminal contempt (one for perjury and the other for refusing to answer questions), and then tried and convicted them himself. The Supreme Court found the procedure to be a denial of due process not only because the judge became part of the prosecution and assumed an adversary position, but also because as a judge passing on guilt or innocence, he likely relied upon "his own personal knowledge and impression of what occurred in the grand jury room," an impression that "could not be tested by adequate cross-examination." *Id.* at 138. The Court decided that "[i]t would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations." *Id.* at 137; *see also* Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation requires evaluation by person other than parole officer who reported violations or recommended rearrest); American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966) (due process requires disqualification of FTC Chairman who had previously investigated controversy before him as Chief Counsel of Senate subcommittee); Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962) (denial of due process for SEC Commissioner to sit on panel adjudicating charge he had investigated before becoming Commissioner).

65. The flexibility of due process should apply to different decisionmaking contexts, not to different cases within a context. The Supreme Court's most successful due process rulings have established rules with general application to similarly situated cases. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (disparate economic conditions experienced by welfare recipients as class distinguished them from other recipients of governmental benefits and, consequently, due process required evidentiary hearing before termination of benefits); Mathews v. Eldridge, 424 U.S. 319 (1976) (needs of Social Security disability recipients as class not so urgent as to require pretermination hearing). Such contextual rules not only guarantee predictability and uniformity in adjudications, they also reduce the cost

mum, the adjudicator should have no responsibility for university fund-raising, have some type of insulating job security such as tenure, have had no part in the investigation of the matter in question, and have had no prior experience with either the matter or the student.

III. "Some Kind of Hearing": The Bias Spreads

The problem facing a university should be how to insulate the hearing, and especially the decisionmaker, from the influence of tainted officials. Rather than even address that problem, however, most universities go the other way. They fight to give students fewer, not more, procedural safeguards.

A. *Why Bias Reaches the Decisionmaker*

As a practical matter, significant insulation of the decisionmaker seems impossible. Even universities the size of small towns constitute the smallest of communities. This is especially true of the administration and faculty. Even without the obvious taint of a high-placed administrator appointing particular faculty members to adjudicate, the administrator remains the superior—or, at least, the colleague—of the faculty members.

A similar problem exists with student adjudicators. By the simple fact that the defendant has been charged, the student adjudicators know the administrator's position and, further, they know the influence university officials have over their lives.[66] Furthermore, students are perhaps even more susceptible to the small community problem. They live together, eat together, and spend their evenings together. Peer pressure is strong and rumors spread quickly, often disseminated in the pages of student publications. For a student decisionmaker to face what can amount to outright coercion by his peers may be too much to ask.

Even if one reaches into the community for impartial decisionmakers, one still encounters difficulty with university influence. Many local people

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and unfairness of post-verdict procedural challenges.

Fairness concerns also dictate a per se rule under the *Mathews v. Eldridge* balance. Having a second university employee, such as a tenured professor, sit as the actual decisionmaker is a small procedural burden when weighed against the student's interest in his education and the chance of erroneous deprivation.

[66] Students place themselves in the professional world through the recommendations and evaluations of university officials, primarily professors. As recommendations are discretionary, and the Supreme Court has said academic evaluations should rarely be questioned, *see supra* note 15, a university can punish a student with impunity. One of the charges against Wilson Crook, for example, was that he had lied about having performed experiments with a device called a "microprobe" in preparation of his thesis. Crook asked another graduate student named Don Alexander, who had assisted Crook in performing the experiments in question, to testify on his behalf at the University hearing. Alexander declined to do so. Alexander was still a candidate for *his* Ph.D. and one of the professors at the University had warned him to "keep a low profile" in the proceedings against Crook. Crook v. Baker, 584 F. Supp. 1531, 1546-47 (1984).

may have an allegiance to the university, if not as alumni, then at least to the university as a major employer. Many universities attempt to improve "town-gown" relations by asking local business people to serve as lecturers, fellows, or in some other flattering capacity.[67] In sum, too many people in a university town live in the university's shadow.[68]

The next alternative would be to select a decisionmaker from outside the university's sphere of influence, preferably one of stature who would be less susceptible to political pressure. The administrative burden, however, would be great—too great to be practical for a university to shoulder every time it sought to suspend a student for common or obvious transgressions, such as fighting or drunkenness.

B. *Why Bias Taints the Rules*

As difficult as it is to insulate the decisionmaker from the influence of biased university officials, currently there is even less possibility of insulating procedural rules from their influence. After *Goss v. Lopez*, the Supreme Court failed to detail explicitly what procedures are due students before expulsion, deciding instead to allow universities "flexibility."[69] Consequently, specific rules were left to be drawn by the very officials against whom they should have afforded protection. The rules they drew, predictably, afforded students very little protection—and universities today fight to keep from giving students more.

As an example, consider the question of what should comprise adequate notice for a student disciplinary hearing. Constitutionally adequate notice should inform someone not just of the pendency of the action, but of the evidence against him and the rules of the forum, so that he "can choose for himself whether to appear or default, acquiesce or contest."[70] Yet, consider what major universities have actually provided as "notice": a student at the University of North Carolina received notice on the day of the hearing, and even then it failed to include the specifics of the charges, the identity of her accusers, or any of the evidence against her;[71] the University of Michigan sent the student a letter raising the matter in question, but failed to make a charge, or specify any of the evidence, the procedures to be used, or even the forum;[72] and for the University of Kansas, notice consisted of telling the student he was already suspended, without having had an opportunity to be heard or even telling him what evidence supported the charge.[73]

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[67] If town-gown relations are poor instead of good, a similar problem of bias may exist.

[68] In 1986, for example, there were 141,300 people employed in Washtenaw County, Michigan. Of those, 47,756 were employed either by the University of Michigan or by the University of Michigan Medical Center, easily making it the County's largest employer. MESC Civilian Labor Force and Employment Statistics (1986) (provided by Washtenaw County Metropolitan Planning Commission; on file with author). Similarly, the University of North Carolina, Indiana Univerity, and Pennsylvania State University were all the largest employers in their communities. Demographic and Employment Statistics (1986) (provided by Chapel Hill-Carrboro Chamber of Commerce; on file with author) (University of North Carolina largest employer in Orange County); Employer Figures (1986) (provided by Greater Bloomington Chamber of Commerce; on file with author) (Indiana University largest employer in Bloomington); Regional Trends and Forecasts (1987) (provided by Centre Regional Planning Commission; on file with author) (Pennsylvania State University largest employer in Centre County). The University of Washington is the third largest employer not just in the Seattle area, but in the entire state of Washington. *1987-88 Top 100*, in Greater Seattle Chamber of Commerce, Directory of Major Employers Central Puget Sound Region (1987).

[69] Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 86 (1978).

[70] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). The Court went on to say that "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably

As another example, consider how the University of Rhode Island provides due process to its students. In the fall of 1977, Steven Gabrilowitz, then a senior at U.R.I., was charged by the local police with assault with intent to commit rape on another student. The criminal charge carried a potential penalty of twenty years in prison. Subsequently, Gabrilowitz was charged by the University on the same facts with violating its *Community Standards of Behavior*. The University charge carried a possible sanction of expulsion. The University decided to hold its disciplinary hearing before Gabrilowitz's criminal trial,[74] but would not allow Gabrilowitz to have an attorney present during that hearing. Gabrilowitz brought a federal suit against U.R.I., claiming that to deny him counsel during the hearing—and, thus, risk incriminating himself before his trial—was a denial of due process. The United States Court of Appeals for the First Circuit agreed and ruled Gabrilowitz had to be allowed to consult with his attorney during the hearing.[75]

Two years later, the University of Rhode Island was in court again with essentially the same situation. This time three students were charged both criminally and by the University with sexual assault. Although the University admitted that, under the *Gabrilowitz* ruling, it had to allow the students' attorneys to be present during its disciplinary hearing, it now was in court to keep those attorneys from cross-examining the University's witnesses. While the Rhode Island Superior Court eventually ruled that

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adopt to accomplish it." *Id.* at 315. Under *Mullane*'s construction, proper notice to a student might be thought to include the elements listed *infra* Section V.B.2. Certainly, all of those points should be considered by a university before they charge a student just to avoid charging him frivolously. Furthermore, if the university is indeed proceeding in good faith, the efficiency of complete notice serves the best interests of all parties by avoiding mistrials—as opposed to allowing "trial by ambush" if the university is not proceeding in good faith.

[71] Jones v. Board of Governors of the Univ. of N.C., 557 F. Supp. 263, 264 (W.D.N.C. 1983).

[72] Picozzi v. Sandalow, 623 F. Supp. 1571, 1580 (E.D. Mich. 1986). The District Court's holding that this constituted constitutionally adequate notice was even more startling.

[73] Gardenhire v. Chalmers, 326 F. Supp. 1200, 1201 (D. Kan. 1971).

[74] As it turned out, Gabrilowitz never was criminally tried. The only witness against him decided to drop the charges and left the state.

[75] Gabrilowitz v. Newman, 582 F.2d 100, 107 (1st Cir. 1978).

the University did not have to allow cross-examination by defense counsel,[76] the more important point is that the University of Rhode Island was in court at all. Cross-examination has long been recognized as one of the best methods for determining truth[77] and a trained trial attorney is the best person to employ that method.[78] Even if U.R.I. was not obligated to allow cross-examination by defense counsel, and even if such cross-examination potentially could have added hours to the hearing,[79] those hours seem a small administrative burden to an institution seeking the truth first—especially with a charge as serious as rape. U.R.I. shouldered a much greater administrative burden by contesting the cross-examination issue in court than simply by allowing the cross-examination.

The *Jones*, *Gardenhire*, *Gabrilowitz*, and *Boyle* cases are not isolated examples. The fact is that most public universities try to short-change their students on procedure. In 1980, Edward J. Golden, the Assistant Dean of Students at the University of Virginia, contacted eighty-three different public institutions and asked them what procedural protections were afforded students who faced disciplinary dismissal.[80] Of the fifty-eight institutions that provided data on disciplinary procedures,[81] 36.2% did not allow cross-examination by defense—not even by the accused student—and 37.9% did not allow the student to have legal counsel.[82] Staggeringly, 55.2% did not guarantee the student an impartial decisionmaker (in the form of either a hearing officer or a tribunal), 60.3% did not guarantee the student a right to confront his accusers, 75.9% did not guarantee the student written findings of fact, and 91.4% provided students with no assistance of any kind—let alone compulsory process—in getting specific persons to testify at proceedings.[83] Golden did not inquire as to conviction rates.

The procedural game too many universities in this country play is to give students enough process to fulfill the vague dictates of *Goss*, but not enough for the student to have a fair opportunity to defend himself—not enough to keep the university, and its officials, from having their way with him.[84] That procedural game is not only unconstitutional, it exposes the myth of universities acting objectively towards their students. There's nothing magically collegial about a university; once a student is charged, a full-fledged adversarial relationship exists, and university officials are like everyone else. They play to win.[85]

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[76] Boyle v. Newman, No. 79-335 (C.A.R.I. June 19, 1980).

[77] *See* McCormick on Evidence §§19-32 (2d ed. 1972).

[78] *See* F. Wellman, The Art of Cross Examination (4th ed. 1936).

[79] Besides the administrative burden of allowing the hearing to escalate, the University of Rhode Island might have had an interest in protecting student witnesses from the trauma of a pointed cross-examination and a consequent chilling effect on future student witnesses. While legitimate, these concerns pale in comparison to allowing accusations of serious crimes, such as rape, to go untested.

[80] Golden, *Procedural Due Process for Students at Public Colleges and Universities*, 11 J.L. & Educ. 337 (1982).

[81] The 58 included 28 doctorate-granting institutions, 13 comprehensive universities and colleges, 8 liberal arts colleges, and 9 professional schools. *Id*. at 348-51.

[82] *Id*. at 345-46.

[83] *Id*. at 345-47.

IV. UNFAIR PROCEDURES AND THE BURDENS THEY CREATE

Under current law, a student at a public university can find himself exposed to a variety of burdens—the cost of a defense, the proof of a due process violation, the risk of self-incrimination—all because of one arbitrary decision by a university administrator.

For the accused student, the first burden is financial. The defense of a student in a disciplinary proceeding can easily become a full-blown criminal defense, and be just as expensive,[86] while students may be among the

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[84] Procedural safeguards, like affirmative defenses, are not created to be loopholes for shysters; they are created to protect the innocent. Given that comparative similarity, the way institutions fight to withhold procedural safeguards calls to mind the words of New Jersey attorney Robert Ansell:

> There is something unsatisfying about the position of those who pay lip-service to the soundness of a . . . defense but fear for its application. It is not unlike the uproar that followed the acquittal of John Hinkley in the attempted assassination of President Reagan. What was it that fueled the demands for the abolition of the insanity defense, especially in a context where it must have been apparent to the community-at-large that Hinkley's connection to reality was, at best, tenuous? What was wrong, of course, was that the defense worked.

Responding Brief on Behalf of Defendant at 14, New Jersey v. Michael Tate, 102 N.J. 64, 505 A.2d 941 (1986) (No. A-23,512).

[85] Major universities in this country have not been above creating new procedures *ex post facto* in order to allow them to discipline students. In *Crook v. Baker*, for example, the University of Michigan arbitrarily decided not to follow its own Graduate School Code of Conduct and Enforcement Procedures. In fact, Virginia Nordby who, at the time of Crook's hearing, had for four years been responsible for drafting codes of conduct and procedures for their enforcement for the various schools of the University, testified that the University of Michigan Graduate School had no procedure for enforcing conduct in place at the time of the Crook matter. However, there had been. Crook v. Baker, 584 F. Supp. 1531, 1538 (E.D. Mich. 1984). In altering the disciplinary procedures, University of Michigan officials, including Nordby, eliminated *inter alia* all lower, mediatory steps in the disciplinary process and eliminated all student participation on the adjudicatory panel. *Id.* at 1539.

[86] In prosecuting the student in *Picozzi v. Sandalow*, for example, the University of Michigan admits to having spent approximately $100,000. *Arbiter at U-M Rules in Favor of Expelled Law School Student*, Ann Arbor News, Aug. 26, 1985, at A1, col.1. That figure included the cost of bringing witnesses to Ann Arbor from as far away as St. Louis and Washington, D.C., of hiring two medical expert witnesses and one arson expert witness, and of preparing over thirty 2'x 3' mounted photographs, an artist's rendering of the student's room, and an aerial photograph of the University of Michigan Law School Quadrangle. The student defendant, to rebut the prosecution, had to spend a similar amount.

In the criminal justice system, before a defendant must pay for a full defense, at least two, and perhaps as many as four, different entities must make a finding that he should be prosecuted. Minimally, a prosecutor must decide to proceed against the defendant and a judge must make a finding of probable cause. Additionally, the prosecutor may not have the opportunity to make a decision if the police do not submit the case to him. Finally, either by law or a prosecutor's election, a determination by a grand jury may also be required.

In contrast, due to the melding of functions, *see supra* notes 50-57 and accompanying text, if a university president, dean, or other official decides a student should be charged, there may be no mechanism to check his decision. On one person's inclination, a student may be forced to decide least able to afford attorney's fees[87] and the other expenses of litigation.[88] Furthermore, students may face unique costs, such as having to travel a great distance to secure counsel from outside the university's sphere of influence.[89] Finally, even if the student can somehow muster the resources to defend himself successfully, he must still be left in a position to pay his tuition.

If the university uses unfair procedures in expelling a student, it creates a second, legal burden for him. The burden should lie with the university to prove the student's guilt in a due process hearing before it expels him. Yet, by using unfair procedures, not only can the university avoid its own burden of proof, but also it forces the student to prove a denial of due process in a civil suit. Moreover, now the student *must* have legal counsel[90] and overcome several obstacles simply to receive fair process: as a constitutional matter, the student may have difficulty proving his case because the Supreme Court has provided no detailed procedural standard for disciplinary expulsions;[91] as an evidentiary matter, the student may have difficulty proving the influence of bias given the subtle way it may pervade the university's administration;[92] and as a financial matter, the stu-

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whether to foot the bill for a major defense or give up his college career.

[87] As one indication of the unusual financial burden that any public university student shoulders, consider that, in the academic year 1985–86, the average indebtedness for a student following four years at a public college was $6,685. J. Hansen, Student Loans: Are They Overburdening a Generation? 8 (1987). Moreover, of students who had outstanding loans, 65.1% owed $5,000 or more. *Id*.

[88] For a brief list of general litigation costs, see F. James & G. Hazard, Civil Procedure §§6.3–6.5 (3rd ed. 1985). Note that contingency fee arrangements only become viable if the student counterclaims against the university for damages arising out of a denial of due process. Even then, the student may have to pay, at the outset, a significant retainer against the lawyer's percentage.

[89] In *Picozzi*, for example, well over a dozen lawyers and law firms in Michigan and Ohio declined to represent the student to avoid being placed in an adversarial position towards the University of Michigan Law School. However, more than the financial cost here is the emotional cost: The student may be left feeling defeated by the simple fact that no one will take his side.

[90] Assuming the student has the legal wherewithal even to consider that there might be a legal challenge to the University's authority, without a national constitutional standard, it may be difficult for a student to know whether he should simply submit to the university's rules, or whether he should challenge them. As the law now stands, just evaluating whether to challenge the university's procedures can be sufficiently complex to require legal counsel. If the student does decide to challenge the procedures, he must then determine *when* to challenge. If he waits until after the hearing to file suit, a court may deem his participation to constitute a waiver. If he files before the hearing and the court finds the procedures adequate, the student bears needless expense and certainly increases the ire of the university.

[91] *See supra* notes 5–14 and accompanying text. Universities can shift the burden of proof to the student *because* of the Supreme Court's failure to articulate a national procedural standard after *Goss*. Yet, shifting the burden of proof allows universities to violate the one explicit rule *Goss* did articulate: It allows a university to suspend a student without due process.

[92] *See supra* notes 58–64 and acompanying text. If university officials do not start out with a bias against a student defendant, they may well develop one after having been forced into court and, possibly, having been sued individually for damages. As these are state institutions, and as one cannot sue the state without its permission, the student's most likely recourse would be a federal action under 42 U.S.C. § 1983 (1981), for a denial of due process and ancillary damages stemming therefrom.

University administrators may seek protection from such claims behind a shield of qualified immudent may not be able to afford his day in court. A student may well be forced from school simply because he cannot afford to compete with the university's far superior resources.[93]

Special risks, as well as additional financial and emotional burdens, arise for the student accused of an act that, in a criminal forum, would constitute a felony. Now the wrong choice may not just mean expulsion; it may mean criminal conviction, because the student runs the risk of incriminating himself in the university disciplinary hearing. How great a risk of self-incrimination—and, thus, how difficult the student's choices—depends upon where in the criminal process the student is when the university decides to hold its hearing.

The easy cases occur when the student has already been criminally tried and a verdict returned before the university hearing. If the student has been acquitted, the double jeopardy doctrine will shield him from a second criminal prosecution based upon an incriminating disciplinary hearing.[94] If the student has been convicted, the problem is in large measure moot.[95] Moreover, on a practical level, having been found guilty beyond a reasonable doubt in a full criminal proceeding, the concern over an erroneous factual finding in the disciplinary hearing dissolves.

The risks become more dramatic where the student has been criminally charged, but not tried, at the time of the university hearing.[96] Here the

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nity. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). The test for qualified immunity focuses in large part upon whether the applicable law was clearly established at the time the action occurred. Thus, the Court in *Harlow* wrote: "If the law was clearly established, the immunity defense ordinarily should fail." *Id*. Ever since *Goss v. Lopez*, the law has been well-settled that before a student can suffer even a de minimis suspension, he must be given notice of the charges and evidence against him, and a hearing before an impartial decisionmaker. *See supra* note 6. However, Supreme Court jurisprudence is not the only well-settled law and, for purposes of defeating a claim of qualified immunity, the body of lower court rulings might be held to put a university administrator on notice that even more elaborate procedures are due. *See, e.g.*, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961) (requiring student-defendant be provided with names of witnesses against him, report of facts to which each witness would testify, be given opportunity to present witnesses or affidavits of witnesses on his own behalf and, if hearing not directly before State Board, results and findings should be presented in report open to student's inspection). In *Goss v. Lopez*, the Supreme Court described *Dixon* as a "landmark decision." 419 U.S. 565, 576 n.8 (1975).

[93] The financial burden seems particularly cruel as the logical effect of expulsion is to reduce the student's earning power. *See supra* note 41 and accompanying text.

[94] *See, e.g.*, United States v. Scott, 437 U.S. 82, 91 (1978) ("A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal.").

[95] It is possible that facts might be exposed in the disciplinary hearing which were not exposed in the criminal trial and, thus, could affect the student's criminal sentencing or some pending civil litigation.

[96] Several federal courts have already ruled that universities may run such hearings in advance of criminal trials. *See* Wimmer v. Lehman, 705 F.2d 1402, 1406 (4th Cir. 1983); Gabrilowitz v. Newman, 582 F.2d 100, 104 (1st Cir. 1978); Hart v. Ferris State College, 557 F. Supp. 1379, 1391

student faces a true Hobson's choice: He can meaningfully defend himself in the disciplinary hearing, potentially incriminating himself[97] and certainly exposing the strengths and weaknesses of his case to the criminal prosecutor, or—wanting most of all to avoid going to prison—he can decide to give his criminal defense its best chance by not putting on a defense in the disciplinary hearing and, thus, simply allowing himself to be expelled. One thing is certain: No matter how the student proceeds with regard to the disciplinary hearing, he will be criminally tried.

The risks are greatest—or, at least, the most difficult to gauge—where the student has not been criminally charged at the time of the university hearing. How he proceeds here with regard to the hearing may *determine* whether he is criminally charged. If, to avoid the risk of self-incrimination, the student does not contest the university's charge and simply allows the expulsion, he faces a devastating blow to his career, but may improve his chances of not being criminally charged and, ultimately, imprisoned. If, however, he puts on a vigorous defense in the disciplinary hearing—and, especially, if the defense means he must testify—then he risks providing the basis for a criminal charge.

One ominous variable, impossible for the student to know, is to what extent university and law enforcement officials may have coordinated their actions against him. Certainly, they share an interest in removing a felon from the community. The connection, though, usually runs deeper. Universities almost always enjoy a cooperative relationship with local law enforcement authorities. Virtually all universities, for example, have their own police forces which are deputized members of the local police.[98] It is

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(W.D. Mich. 1983).

[97] A state entity may not in any way penalize a person for exercising his right against self-incrimination. *See* Lefkowitz v. Turley, 414 U.S. 70 (1973) (holding unconstitutional state statute which provided that, if officer of political party was subpoenaed by grand jury to testify about his conduct in office and refused to testify or waive immunity against criminal prosecution, his term of office would be terminated and he would be disqualified from holding any party or public office for five years); Garrity v. New Jersey, 385 U.S. 493 (1967) (setting aside convictions of police officers who answered incriminating questions only after being told refusal to answer would result in loss of their jobs). Yet, only 22.4% of the responding institutions in Golden's study, *supra* note 80, allowed student defendants to remain silent in disciplinary hearings without a negative inference being drawn—which may indicate how unconstrained by the law universities feel. However, if a student, after conferring with counsel, decides to testify—not because the university has told him he must, but because he thinks he should in order to rebut the university's case—then the student has knowingly waived his right against self-incrimination and the testimony is admissible in a criminal prosecution. *See* Moran v. Burbine, 106 S. Ct. 1135 (1986) (waiver is valid if suspect's decision not to rely on his rights was uncoerced, if he knew at all times that he could stand mute and request lawyer, and if he was aware of state's intention to use his statements to secure conviction); Rogers v. United States, 340 U.S. 367 (1951) (once incriminating facts have been voluntarily revealed, privilege against self-incrimination cannot be invoked to avoid further disclosure).

[98] In a nationwide survey of college and university police forces, 210 of 230 responding public institutions indicated that their police forces have arrest authority derived either from state police, local police or sheriffs, or from state or local statute, or from both. 1985-1986 Survey of the International Association of Campus Law Enforcement Administrators (raw data obtained from Pennsylva-

common for local, non-university police to keep academic officials apprised of developments in criminal investigations, for the police to make their files available to universities, and for police officers to make themselves available to testify at university disciplinary hearings.[99] The danger is that, by assisting in university disciplinary proceedings—and, in fact, by encouraging them—local law enforcement authorities have an opportunity to test a student's case, to have him incriminate himself where before he could not be compelled to speak, or even to try to make a case where one could not be made before.[100]

V. THE BALANCING ACT: LEGITIMATE INTERESTS AND PROCEDURAL PROTECTIONS

The primary function of a university is to provide an education to all of its students. The rights of the individual student must, of necessity, be constrained at the point where they infringe upon the educational rights of other students—whether it be in limiting speech so as not to drown out competing ideas, or whether it be in regulating behavior so as to secure the safety of the university community. Moreover, because the university's primary function is education rather than regulation, and because university officials must deal with large numbers of students, those officials must be accorded a degree of discretion. To conduct a full procedural hearing for every alleged act of student misconduct obviously would be too great an administrative burden, making the job of education impossible. Yet, while many university officials do police these legitimate interests in good faith, procedural requirements must be constructed with those who do not act in good faith in mind. Therein lies the procedural challenge: How to

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nia State University Department of University Safety; on file with author).

[99] Wimmer v. Lehman, 705 F.2d 1402 (4th Cir. 1983); Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978); Picozzi v. Sandalow, 623 F. Supp. 1571 (E.D. Mich. 1986); Hart v. Ferris State College, 557 F. Supp. 1379 (W.D. Mich. 1983).

[100] In *Picozzi*, the local prosecutor declined to prosecute the student defendant. Complaint at F-1, Picozzi v. Sandalow, 623 F. Supp. 1571 (E.D. Mich. 1986) (No. 84-CIV-7406-AA). The prosecutor requested that the police try to convince the student to take a polygraph examination. *Id.* The request came to the student, not from the police, but from the Dean after the student had already been suspended. *Id.* at N-1. The Dean informed the student that he would be re-admitted only if he passed a polygraph examination administered by the police or if he submitted to an administrative hearing. The Dean, however, never informed the student of the rules of the hearing, the charges against the student, or the evidence against the student. Moreover, he urged the student to forego the hearing and simply submit to the polygraph. *Id.* From the point of whether the student would be re-admitted, both the Dean's lack of adequate notice to the student and his belief that a polygraph examination is an adequate substitute for due process are, at best, questionable. Arguably, however, by encouraging the student to submit to a police polygraph examination—indeed, by conditioning the retention of a constitutionally protected interest by the waiver of another constitutional right—the Dean became part of the criminal prosecution. Even if the polygraph results were not admissible in a criminal prosecution, the tactic of using a failed polygraph exam to coax a confession is common police practice. *See, e.g.*, Oregon v. Bradshaw, 462 U.S. 1039 (1983); Wyrick v. Fields, 459 U.S. 42 (1982); United States v. Gillyard, 726 F.2d 1426 (9th Cir. 1984).

protect the private interest of the student without so burdening university officials with procedures that they cannot effectively discharge their *legitimate* responsibilities.

The Supreme Court has insisted upon flexibility in procedure, not just out of deference to legitimate academic judgment, but because "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[101] Flexibility invites abuse, however, for it allows the university to select procedure after it has selected a culprit. University officials need to know what procedures *must* be provided and the student needs to know upon what procedure he can rely.

Because of this need for certainty, the proposals below do not provide for a sliding scale. Instead, they provide for three, distinct categories—based upon the severity of the misconduct and of the possible sanction—so that all similarly situated cases will use the same procedures. Thus, both the administrator and the student will *know* what process is due.[102] The procedures allow the administrator the greatest amount of discretion where the student has the smallest interest at stake. Realistically, these "Minor Offenses" constitute the bulk of disciplinary situations. However, where the student's interest grows, and implicates at least a property or liberty interest, and potentially his freedom, the student's interests outweigh the burden on the university in following more rigorous procedures. Thus, in those situations—which, in fact, occur infrequently—the administrator is left with little discretion.

The following proposals for disciplinary procedures are meant to be a guide for universities in creating their own, specific rules. Detailed aspects of the proposals are meant to be suggestive only. The key lies in the values embodied in the proposals and, more importantly, the functions they recommend be performed. These functions should ameliorate the problems outlined in this Note.

A. *Minor Offenses*. Where the potential penalty will have no permanent effect on the student's academic record—and, thus, implicates no property or liberty interests—the Disciplinary Administrator (the university official responsible for instigating charges) need only provide the student with an opportunity to discuss the matter in an informal setting.

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[101] Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961) (exclusion of cook from Naval Gun Factory, without notice or hearing, for failure to meet security requirements not violative of due process).

[102] Rules offer no protection, however, if the university can simply wish them away. Therefore, a university should not be allowed to charge, prosecute, or discipline a student under a rule which had not been published prior to the student's registration for that academic year.

To guard against a university unfairly shifting the burden of litigation onto the student through use of inadequate procedures, per se rules for costs and liability should be adopted. For example, if the university in any way deviates from its published procedures and the student consequently brings suit to challenge that deviation, the university should reimburse any expenses the student may incur in doing so—whether the change in procedure is found by the court to comply with due process or not. If the deviation is found not to comply with due process, the university officials named in the suit should be held per se liable for punitive damages.

B. *Major Offenses*. Where the potential penalty does involve a permanent mark on the student's record—and, thus, does implicate property and liberty interests—the student should be provided with a full array of procedural safeguards.

1. *The Charging Process*. At a minimum, the procedures should provide for an Investigations Committee, or some mechanism like a Grand Jury, to make a finding of probable cause. It should consist both of tenured faculty serving on a rotating basis,[103] and of students elected by the entire student body.[104]

If the Disciplinary Administrator believes that reasons exist for a student to be charged with a Major Offense, he should submit those reasons in writing to the Investigations Committee, along with a request that the Committee issue a formal charge against the student. The student should receive a copy of the written request.

Upon receiving a request for a student to be charged, the Committee should discreetly investigate the matter however it deems appropriate. It should, though, keep the subject of the investigation confidential. Its deliberations and investigations should especially be kept confidential from the Disciplinary Administrator until it reaches a decision. It should, however, provide the defendant student with an opportunity to recommend, in writing, areas of investigation.[105]

The Committee should inform both the Disciplinary Administrator and the student, in writing, of its decision. If it finds cause for proceeding against the student, it should specify the offenses with which the Disciplinary Administrator may charge the student.

2. *Notice*. If the Disciplinary Administrator decides to proceed, he should issue written notice to the student. Proper notice would inform the student of (1) the precise charges lodged against him, (2) the name(s) of the person(s) accusing him,[106] (3) the specific regulations under which he

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[103] Rotating faculty on the Investigations Committee serves three functions: first, it hedges against biased faculty members intentionally being kept on the Committee; second, it guards against the development of a "pro-conviction" attitude from having filled a prosecutorial role for too long; third, it requires many faculty members to be exposed to the students' views on the process.

[104] If one purpose of education is to teach the "fundamental values necessary to the maintenance of a democratic political system," Ambach v. Norwick, 441 U.S. 68, 77 (1979), then it makes sense for students to learn that protection of their individual rights against a greater utilitarian "good" requires responsible participation in elections.

[105] There may be an equally likely suspect who has been overlooked, some other exculpatory evidence, or a simple explanation for what appears to be misconduct. In any event, it serves efficiency for those facts to be aired in the preliminary stages rather than waiting for a full procedural hearing which may, in fact, be unnecessary.

[106] Identifying the accuser may expose him to peer pressure or even outright intimidation. Yet, a

is being charged, (4) the identity of the prosecuting authority, (5) the forum in which the prosecution will take place, (6) the date and place of the hearing, (7) the names of the witnesses testifying against him, (8) a summary of their testimony, (9) a statement of his rights at the forthcoming hearing, (10) the possible sanctions he faces, and (11) his right to appeal any adverse decision.[107] Additionally, the university should have an ongoing duty to disclose to the student any evidence that tends to negate his guilt.[108] The notice should be given in a timely fashion. Reasonable postponements of the hearing should be granted automatically to the student as needed for him to secure counsel and to prepare an adequate defense.

3. *Intermediate Steps*. Before a formal hearing takes place, a student should, at his option, be given an opportunity to discuss the matter in an informal setting with the Disciplinary Administrator in order to achieve a resolution. To promote a full exchange, the contents of the discussions should not be used by either side in the subsequent disciplinary hearings.[109]

A hearing should take place before even a de minimis suspension.[110] Suspension may take place prior to a hearing only in cases where the

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student defendant must, at some point, have the opportunity to confront his accusers and, more, that right to confrontation may be impoverished by a lack of discovery. *See Proposed Amendments to Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 91 (1974) (Statement of Dean Pye):

> The cross-examiner has many weapons at his disposal: the development of inconsistencies in the witness' testimony, the establishment of contradictions between the testimony of the witness and the testimony of others, and the impeachment of the witness through the use of prior inconsistent statements, proof of bias, or proof of prior convictions. Effective cross-examination without broad discovery is frequently impossible except in the unusual case where the defendant is sufficiently wealthy to hire private investigators. It is extremely difficult to develop inconsistencies or to effectively impeach any witness whose identity is unknown until he is sworn or until his name is divulged in voir dire.

[107] All of the points of notice included here are either procedural decisions that should already have been made and published, scheduling decisions, or matters which the university should have fully explored before deciding to charge the student (e.g., who are the witnesses and what they will say). Having already made those determinations, the administrator need only draft a letter. In exchange, such complete notice prevents claims of mistrial from errors of surprise and, consequently, prevents needless litigation. In sum, besides being just plain fair, it is procedurally efficient.

[108] As with any prosecutorial authority, university officials have a duty not just to convict the student as advocates, but to facilitate justice. *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1986); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1986).

[109] *Cf.* FED. R. EVID. 408 ("Evidence of conduct or statements made in compromise negotiations is . . . not admissible."); FED. R. EVID. 410 (holding as inadmissible "any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn").

[110] What constitutes a de minimis suspension in the university context has never been defined. The only guide comes from Justice White's statement in *Goss v. Lopez* that a ten-day suspension for public high school students was not de minimis. 419 U.S. 565, 576 (1975). This Note takes the position that any suspension that significantly disrupts a student's studies, or in any way is likely to label him as being disciplined to his classmates, is not de minimis. This Note suggests, therefore, a threshold of any suspension lasting more than one full day on which classes meet or any exclusion from school dormitories.

student's presence presents an imminent danger of bodily harm.[111] Whenever a suspension takes place prior to a hearing, the hearing must be provided to the student as soon thereafter as practicable.

4. *The Hearing*. The hearing should take place before a faculty Hearing Officer and a student jury. The Hearing Officer should be selected by the Investigations Committee.[112] The Hearing Officer should not be someone sitting on the Investigations Committee, should not have had any previous contact with the matter in controversy, should have no pecuniary interest in the matter, and should not be the Disciplinary Administrator. Student jury members, including alternates, should be elected in the spring to serve in all disciplinary hearings in the following academic year.[113] The student defendant and the Disciplinary Administrator should each have peremptory challenges of jurors.[114]

A proper hearing should (1) consider only the charges and evidence of which the student has formal notice, (2) be open or closed to the public according to the student defendant's choice, (3) allow the student the assistance of counsel, (4) require witnesses to testify under oath,[115] (5) provide the student with a chance to confront and cross-examine his accusers, (6) provide the student with an opportunity to present evidence and witnesses on his own behalf, (7) not require a student to testify against himself and not allow any adverse inference to be drawn from the student's silence, (8) provide the student with compulsory process over people, objects and documents within the university community, except those otherwise covered by privileges of confidentiality under law,[116] (9) require the university to prove its charge(s) by clear and convincing evidence,[117] (10) be recorded and transcribed, and (11) produce a written finding of facts by the jurors.[118]

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[111] Judgments of "imminent danger" require immediate action and, thus, are best left to the discretion of the Disciplinary Administrator. The decision, however, should be reviewed as soon as is practicable by the Investigations Committee, which should have the final decision.

No Disciplinary Administrator should be liable for having suspended a student immediately under a belief of imminent danger; liability should lie, however, against any Disciplinary Administrator who unreasonably delays submitting his decision for review.

[112] The Investigations Committee, as a standing independent body representing views of both faculty and students, seems an appropriate selection mechanism for the Hearing Officer. The percentage of votes required for selection of the Hearing Officer should be high enough to require votes of both faculty and student members.

[113] The student jury is intended to act as a check against the influence of the Disciplinary Administrator. Student bias or harshness can be checked by requiring only a small dissent for acquittal and, ultimately, by allowing any penalty imposed to be reduced at the discretion of the Disciplinary Administrator.

[114] The problem of prior contact between a juror and some other party at the hearing seems especially likely in the small community of a university. The number of challenges must be limited, though, so as not to exceed the number of available alternate jurors. The challenges are peremptory because of the difficulty in defining what should be a challenge for cause in the university setting.

[115] The purpose of an oath is to awaken the conscience of a witness and impress upon him the duty to testify truthfully. *See, e.g.*, United States v. Looper, 419 F.2d 1405, 1407 n.3 (4th Cir. 1969).

[116] Compulsory process means that the university will use the full extent of its influence to secure witnesses and documents. No enforcement mechanism, therefore, is necessary to produce university employees and documents in the university's possession. Students should be required to appear at such hearings, upon formal request, as a condition of their enrollment—just as following any other

In the event of acquittal, the student's permanent record should either be expunged of any reference to the matter or have added to it a statement of his acquittal, at the student's option. Additionally, in the event of an acquittal, the university should reimburse the student's reasonable costs.

C. *Felony Offenses*. Any time the university charges a student with an offense which could form the basis for a criminal felony charge, the procedure accorded a student should be the same as in the case of Major Offenses, with the following additional protections.

If the student has already been criminally charged, the university should not hold its own hearing prior to the criminal trial. If the student decides to postpone the hearing until after the criminal disposition, he should be allowed to withdraw completely from the university community and then return, without prejudice, to face the university adjudication as soon as is practicable. Alternatively, he should be allowed to continue to attend classes under whatever restrictions (e.g., a student escort) the university may impose.

If the student has not been criminally charged, he should also be allowed to withdraw for a reasonable period, until the local law enforcement authorities have disposed of the matter. If he is charged, he should again be allowed to postpone the university adjudication until after the criminal trial. If the case is simply filed inactive, however, the university should be able to require his immediate return to face the university

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rule is a condition of enrollment. If, for some reason, a student witness still cannot be compelled to appear, the student defendant should be allowed to argue that fact to the jury.

The purpose of these rules is to minimize the effect of the university's much greater influence on the outcome of the hearing.

[117] Courts, universities, and student defendants all seem to agree that the appropriate standard of proof in student disciplinary cases is one of "clear and convincing" evidence. *See* Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J. COLLEGE & U.L. 71 (1985).

[118] Compare the elements of a fair hearing listed by Judge Friendly, *supra* note 43, at 1279–92: (1) an unbiased tribunal; (2) notice for the proposed action and the grounds asserted for it; (3) opportunity to present reasons why the proposed action action should not be taken; (4) the right to present evidence, including the right to call witnesses; (5) the right to know opposing evidence; (6) a decision based exclusively on the evidence presented; (7) right to counsel; (8) requirement that tribunal prepare a record of the evidence presented; (9) requirement that the tribunal prepare written findings of fact and reasons for its decision. Friendly omits cross-examination on the grounds that it would add delay and the necessity of counsel. *Id.* at 1285. He intends his elements, however, to apply to the entire spectrum of due process hearings. In contrast, a student facing dismissal faces a more severe deprivation than that faced in many of the settings Friendly contemplates and, consequently, the *Mathews* balance indicates greater process is due. Moreover, as student disciplinary hearings are quasi-criminal prosecutions, the verdict may turn more regularly on the credibility of non-government witnesses. *Cf.* U.S. CONST. amend. VI (right of confrontation limited to criminal cases).

charges.[119] (If someone else is criminally charged, presumably the university will drop its charges.)

The substantive procedures used for a Major Offense should be altered as follows: (1) the Hearing Officer should be someone unconnected with the university—such as a tenured professor from another institution, a practicing attorney, or a professional mediator—and should preside at the university's expense; (2) if the student cannot afford legal counsel, the university should provide an attorney for him;[120] (3) a unanimous vote of the jury should be required to convict.[121]

VI. CONCLUSION

Clearly, the process that public universities currently provide to students is unacceptable by any standard. The courts, not biased administrators, should dictate disciplinary procedures. And if the courts fail to ensure students fair procedure, then the lesson they will teach the nation's youth is that a right to due process is a right to nothing at all.[122]

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[119] The burden always remains on the university to proceed, however. It should never be allowed to place the student in the position of having to request due process in order to complete his education. In Gardenhire v. Chalmers, 326 F. Supp. 1200 (D. Kan. 1971), the student defendant received notice of suspension and was advised that he had, at his discretion, the right to review by the university governing board constituted to handle disciplinary matters. The district court ruled the student's due process rights had been violated, stating that, "in the light of near unanimous authorities, 'the right of review' (or a hearing only upon request), does not serve to protect the right of the student to fundamental fairness in this type of proceeding. One does not have to be a supplicant for allowance of a constitutional right." *Id.* at 1204.

[120] The Supreme Court has stated that "fundamental fairness" requires appointed counsel for an indigent litigant only when the litigant may be deprived of his physical liberty if he loses. Lassiter v. Department of Social Services, 452 U.S. 18, 24–25 (1980) (Constitution does not require appointment of counsel for indigent parents in parental status termination hearing). If a person has been accused by the state, however, or if counsel is necessary to safeguard some independent constitutional right, *see, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966), then the Sixth Amendment requires appointed counsel at any critical stage on the path to potential incarceration. United States v. Wade, 388 U.S. 218 (1967) (post-indictment line-up critical stage of prosecution requiring appointment of counsel). The Court in *Wade* explained that a critical stage is "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Id.* at 226.

While a student disciplinary hearing is not part of a formal criminal proceeding, it is a place where the state, through its agents, accuses a particular student of a felony. Furthermore, in answering that accusation in a constitutionally mandated hearing, the student may make incriminating statements to be used by the state in a later criminal prosecution. *See supra* note 97. Thus, a student disciplinary hearing is consistent with other situations in which the Supreme Court has required appointed counsel. *See* Maine v. Moulton, 474 U.S. 159 (1985) (Sixth Amendment violated when state obtains incriminating statements by knowingly circumventing accused's right to have counsel present in confrontation between accused and state agent); United States v. Henry, 447 U.S. 264 (1980) (violation of Sixth Amendment for government intentionally to create situation likely to induce defendant to make incriminating statements without assistance of counsel); Coleman v. Alabama, 399 U.S. 1 (1970) (state's preliminary hearing critical stage requiring appointment of counsel); *see also* United States v. Henry, 447 U.S. at 275–77 (Powell, J., concurring) (emphasizing that case did not involve spontaneous statements or passive listening devices, but rather defendant submitted to "functional equivalent of interrogation").

[121] Given the extreme penalties that attend expulsion for a *de facto* felony, the protection of a unanimous jury verdict balances against the lesser procedural protection of a disciplinary hearing as compared to a criminal trial (a "clear and convincing" standard versus "beyond a reasonable doubt," the greater probability of unfair influence reaching a hearing officer as opposed to a judge, or reaching student jurors as opposed to jurors from the community).

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[122] In conclusion, I would like to extend my deepest thanks to Alan Silber, Esq., Dr. Josiah Thompson, Dr. Heinrich von Staden, and Dr. Ramzi W. Saad, none of whom had anything to do with the mechanics of writing this Note, but without any of whom I never would have had the opportunity to write it and, ultimately, the opportunity to practice law.

DUE PROCESS RIGHTS IN STUDENT DISCIPLINARY MATTERS

INTRODUCTION

Student disciplinary proceedings[1] frequently intimidate college and university officials as well as students. In institutions of higher education bound by the due process clause,[2] the possibility of legal action exists when a university official neglects to ensure a student's due process rights. Since the Fifth Circuit's landmark decision in *Dixon v. Alabama State Board of Education*,[3] federal courts have consistently held that due process requires that tax-supported universities give students notice and the opportunity for a hearing before expulsion for misconduct. The United States Supreme Court has offered little guidance on this issue. In *Goss v. Lopez*,[4] the Court followed *Dixon* and held that "[a]t the very minimum, students facing some kind of suspension . . . must be given *some* kind of notice and *some* kind of hearing."[5] Although the *Goss* facts confined the holding to ten-day suspensions of public high school students, the Court ventured that "more formal procedures" may be required for longer suspensions or dismissals.[6] In *Board of Curators of the University of Missouri v. Horowitz*,[7] the United States Supreme Court limited the *Goss* due process requirements to suspensions and dismissals for misconduct. While ruling that dismissals for academic inadequacy need "far less stringent procedural requirements,"[8] the *Horowitz* decision lacked clear guidelines to distinguish between academic and disciplinary matters.[9]

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[1] While penalties for disciplinary violations vary, due process concerns most frequently arise when educational institutions impose the more serious penalties of suspension or expulsion. *See* Herman v. University of S.C., 457 F.2d 902, 903 (4th Cir. 1972) ("Expulsion is the 'capital punishment' of university discipline."), *aff'g*, 341 F. Supp. 226 (D.S.C. 1971).

[2] This article will not compare the rights of students in private colleges or universities with those in public institutions. At most private institutions, a student handbook, disciplinary code of conduct, or similar document usually grants some due process rights to the student. Consequently, a student in a private institution may bring suit for breach of contract if denied due process as stated in the handbook. *See* Cloud v. Trustees of Boston Univ., 720 F.2d 721, 724 (1st Cir. 1983); Slaughter v. Brigham Young Univ., 514 F.2d 622, 626 (10th Cir. 1975), *cert. denied*, 423 U.S. 898 (1975); Fussell v. Louisiana Business College of Monroe, 478 So. 2d 652, 654 (La. App. 1985).

Students have also successfully challenged disciplinary proceedings in private universities by using the "state action" theory under the fourteenth amendment and 42 U.S.C. § 1983. *See generally* Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 J.L. & EDUC. 171 (1982); Annotation, *Action of Private Institution of Higher Education as Constituting State Action, or Action Under Color of Law, for Purposes of Fourteenth Amendment and 42 U.S.C.S. § 1983*, 37 A.L.R. FED. 601 (1978).

[3] 294 F.2d 150, 158 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). In *Dixon*, five students who had participated in civil rights demonstrations were expelled from Alabama State College without notice, hearing, or appeal. Because *Dixon* introduced constitutional safeguards into the area of student discipline, the United States Supreme Court acknowledged the case as a "landmark decision." Goss v. Lopez, 419 U.S. 565, 577 n.8 (1975). The Fifth Circuit referred to *Dixon* as "[t]he classic starting point for an inquiry into the rights of students at state educational institutions of higher learning." Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 999 (5th Cir. 1975). *See also* Blanton v. State Univ. of N.Y., 489 F.2d 377, 385 (2d Cir. 1973) (referring to *Dixon* as a "path-breaking decision"); Jones v. Tennessee State Bd. of Educ., 279 F. Supp. 190, 197 (M.D. Tenn. 1968) ("The leading case involving . . . a disciplinary proceeding. . . .").

The ambiguities of *Goss* and *Horowitz* have generated a myriad of challenges to school-imposed sanctions for alleged student misconduct.

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[4] 419 U.S. 565 (1975). Without a hearing, Lopez and eight other high school students received ten-day suspensions for their misconduct at school. The United States Supreme Court ruled that fourteenth amendment due process rights prevent a student's suspension from public school without certain procedural safeguards. *Id.* at 577-84. A divided court (Burger, C.J., Powell, J., Blackmun, J., and Rehnquist, J., dissenting) ruled in favor of the students.

[5] 419 U.S. at 579. The Court stated that the notice and hearing requirement could be fulfilled simply by "informally discuss[ing] the alleged misconduct with the students minutes after it occurred." *Id.* at 582. *See generally* Mass, *Due Process Rights of Students: Limitations on* Goss v. Lopez—*A Retreat out of the Thicket*, 9 J.L. & EDUC. 449 (1980); Timar, The *Aftermath of Goss in the Federal Courts*, 9 NOLPE SCH. L.J. 123 (1981).

[6] *Goss*, 419 U.S. at 584.

[7] 435 U.S. 78 (1978). School officials dismissed Horowitz, a fourth-year medical school student, for failing to meet academic standards. The Supreme Court unanimously held that the procedures leading to Horowitz's dismissal did not violate her fourteenth amendment due process rights. *Id.* at 86. *But see id.* 92-96 (Powell, J., concurring), 96-97 (White, J., concurring in part and in judgment), 97-108 (Marshall, J., concurring and dissenting in part), 108-09 (Blackmun, J., and Brennan, J., concurring and dissenting in part).

[8] 435 U.S. at 86. *See generally* Brenner, *Charlotte's Web: Reflections on the Role of Due Process in Academic Decisionmaking*, 56 IND. L.J. 725 (1981); Buss, *Easy Cases Make Bad Law: Academic Expulsion and the Uncertain Law of Procedural Due Process*, 65 IOWA L. REV. (1979); Gee, *Constitutional Law--Procedural Due Process for Academic Dismissals*, 28 HOW. L.J. 713 (1985); Jennings, *Academic Dismissals: A Due Process Anomaly*, 58 NEB. L. REV. 519; Marx, *Horowitz: A Defense Point of View*, 13 J.L. & EDUC. 51 (1984); Singer, *Student Suspensions and Expulsions*, 17 AM. BUS. L.J. 526 (1980); Case Comment, *Fourteenth Amendment Due Process Does Not Require a Hearing Prior to the Dismissal of a Student for Academic Deficiencies*, 56 U. DET. J. URB. L. 225 (1978); Case Comment, *Academic Dismissals From State-Supported Universities: A Study in Policy*, 13 VAL. U.L. REV. 175 (1978); Case Comment, *Student Due Process Rights and Judicial Deference to Academic Dismissals*, 15 WILLAMETTE L. REV. 577 (1979).

[9] Although the Court unanimously agreed that Ms. Horowitz received adequate procedural protection, it split (5-4) on the academic/misconduct distinction. Justice White concurred separately to state his disagreement with this distinction. *Id.* at 96-97. Justice Marshall, dissenting and concurring in part, found the academic/misconduct distinction irrelevant: "In my view the effort to apply such labels does little to advance the due process inquiry. . . ." *Id.* at 97.

Many courts have failed to distinguish between what due process they require and what they approve. Moreover, decisions which have specified certain procedures are frequently limited to the particular facts of the case.[10] This wide range of decisions[11] obscures the threshold of acceptable procedure in student disciplinary hearings. Necessarily, these nebulous standards prompt two questions: (1) what factors raise substantive issues in a student disciplinary matter? and (2) precisely what process is due in a student disciplinary hearing?

I. Substantive Issues In Student Disciplinary Matters

College and university officials view student disciplinary matters as a fact of academic life. Yet, each disciplinary action may potentially end up in a court of law if a university official is perceived to have violated a student's rights.[12] In addition to procedural rights, university officials must consider substantive issues, including the classification of the student's conduct and the appropriate penalty for the student's disciplinary violation.

A. *Classification of Student Conduct*

The rights of a student vary, depending upon whether a court classifies an action as disciplinary or academic.[13] Refusing to equate misconduct with academic failure, courts have historically distinguished disciplinary from academic matters.[14] In maintaining this distinction, *Horowitz* held that a hearing, although helpful in a disciplinary proceeding, is "useless or harmful" in an academic proceeding.[15]

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[10] "Just how much process is 'due' before a public educational institution may suspend a student is difficult precisely to define, apart from a specific factual setting." Gorman v. University of R.I., 646 F. Supp. 799 (D.R.I. 1986).

[11] *See generally* 15A Am. Jur. 2d *Colleges and Universities* §§ 23, 26-28 (1976 & Supp. 1986); 14 C.J.S. *Colleges and Universities* § 26 (1939 & Supp. 1986).

[12] "Only where erroneous and unwise actions in the field of education deprive students of federally protected rights or privileges does a federal court have power to intervene in the educational process." Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education, 45 F.R.D. 133, 136 (W.D. Mo. 1968) [hereinafter Judicial Standards].

[13] Dixon v. Alabama Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

[14] "Misconduct is a very different matter from failure to attain a standard of excellence in studies." *Horowitz*, 435 U.S. at 87 (quoting Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 22, 102 N.E. 1095, 1097 (1913)). This rule has been uniformly accepted in state courts and, until the Eighth Circuit's decision in *Horowitz*, 538 F.2d 1317 (8th Cir. 1976), rev'd, 435 U.S. 78 (1978), "the Courts of Appeals were also unanimous in concluding that dismissals for academic (as opposed to disciplinary) cause do not necessitate a hearing before the school's decision-making body." 435 U.S. at 87.

[15] 435 U.S. at 89 (quoting *Barnard*, 102 N.E. at 1097). The Court reasoned that disciplinary proceedings closely resemble traditional judicial and administrative fact-finding situations. Consequently, a hearing in a disciplinary matter serves as a "hedge against error," while academic proceedings do not. *Id. See also* Mahavongsanan v. Hall, 529 F.2d 448, 449 (5th Cir. 1976) ("[T]he due process requirements of notice and hearing . . . have been carefully limited to disciplinary decisions.").

Therefore, courts allow educational institutions to establish their own academic requirements and processes without judicial intervention. Courts generally agree that while a hearing best resolves disciplinary matters,[16] the subjectivity of academic judgment does not adapt well to procedural due process. Because courts find that faculty members are in the best position to academically evaluate students[17] they generally respect the faculty's judgment when reviewing academic decisions.[18]

Since academic dismissals require minimal procedural protection, procedural due process violations are rare. Court reversals of academic dismissals usually result from a substantive due process violation. Such a violation would include a decision based on unconstitutional criteria or a decision which was "arbitrary and capricious." The United States Supreme Court, in *Regents of University of Michigan v. Ewing,*[19] set a rigid standard to determine arbitrary and capricious behavior. The Court ruled that if the school's decision was not made in bad faith and the procedures applied were not unfair, the decision will stand unless it "is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[20]

This judicial deference to academicians in academic matters provides a testing ground for university officials as well as students. Courts are aware that university officials may characterize an issue as academic, while a student may want to couch the same matter in disciplinary terms.[21] University officials violate due process protections if they erroneously classify a matter as academic and do not afford the student a hearing.[22] Differentiating between misconduct and a failure to meet scholastic standards "depends upon a collection of the facts concerning the charged misconduct."[23] Courts may have difficulty drawing this distinction, as evidenced by the Supreme Court's 5-4 split in *Horowitz*.[24]

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[16] "A decision relating to the misconduct of a student requires a factual determination as to whether the conduct took place or not. The accuracy of that determination can be safeguarded by the sorts of procedural protections traditionally imposed under the Due Process Clause." *Horowitz*, 435 U.S. at 95 n.5 (Powell, J., concurring). *But cf.* Ross v. Pennsylvania State Univ., 445 F. Supp. 147, 156 (M.D. Pa. 1978) ("The failure to afford Ross a hearing at which he could explain any mitigating circumstances for his poor scholarship before terminating him as a graduate student violated his right to due process.").

[17] *See* Navato v. Sletten, 560 F.2d 340, 345 (8th Cir. 1977) ("School officials have a strong interest in freedom from outside intervention in matters of academic evaluation."); Greenhill v. Bailey, 519 F.2d 5, 9 (8th Cir. 1975) ("A graduate or professional school is, after all, the best judge of its students' academic performance and their ability to master the required curriculum."); Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1250 (E.D. Mich. 1984) ("While a university cannot ignore its duty to treat its students fairly, neither is it required to transform its classrooms into courtrooms.") (citing Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 1000 (5th Cir. 1975)), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986).

[18] *See* Regents of Univ. of Mich. v. Ewing, 106 S. Ct. 507, 513 (1985) ("When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment."); *Horowitz*, 435 U.S. at 90 (enlarging judicial presence in the academic community would "risk the deterioration of many beneficial aspects of the faculty-student relationship.") *See generally* Milam and Marshall, *Impact of* Regents of the University of Michigan v. Ewing *on Academic Dismissals from Graduate and Professional Schools*, 13 J.C. & U.L. 335 (1987).

[19] 106 S. Ct. 507 (1985).

[20] *Id.* at 1573. *See also Horowitz*, 435 U.S. at 88-89 ("Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to . . . judicial and administrative fact-finding proceedings.").

Although some courts discuss the importance of the academic/misconduct distinction, little guidance exists to determine proper classification of a student action. One court found a disciplinary matter when scholastic standards are not involved and the parties dispute "facts concerning whether [the student] did or did not comply with certain school regulations."[25] Because cheating involves both prongs of this test, courts have addressed due process issues stemming from cheating in both the academic[26] and the disciplinary[27] context. In ruling cheating a disciplinary matter, the court in *Jaksa v. Regents of University of Michigan*[28] acknowledged that cheating is "an offense which cannot be neatly characterized as either 'academic' or 'disciplinary.' "[29]

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[21] *See, e.g.*, Keys v. Sawyer, 353 F. Supp. 936, 939 (S.D. Tex. 1973) (quoting Egner v. Texas City Indep. School Dist., 338 F. Supp. 931, 937 (S.D. Tex. 1972)); *see also* Jansen v. Emory Univ., 440 F. Supp. 1060, 1063 (N.D. Ga. 1977) (If the decision to dismiss the student was "essentially academic and neither alleged nor shown to be a mere pretense to punish him for disciplinary infractions," it is not subject to judicial review.), *aff'd*, 579 F.2d 45 (5th Cir. 1978).

[22] *See, e.g.*, Woody v. Burns, 188 So. 2d 56 (Fla. Dist. Ct. App. 1966). Noting that it would not have interfered had the student been dismissed for academic reasons, the court reinstated the student because he had, in fact, been dismissed for misconduct. *Id.* at 59.

[23] Dixon v. Alabama Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). The 1960s brought many successful student due process challenges to institutional penalties. *See, e.g.*, Soglin v. Kauffman, 418 F.2d 163, 168 (7th Cir. 1969) ("[E]xpulsion and prolonged suspension may not be imposed on students by a university simply on the basis of allegations of 'misconduct' without reference to any preexisting rule which supplies an adequate guide.").

However, the pre-1960s courts favored the in loco parentis doctrine and gave great deference to the college or university. *See, e.g.*, People *ex rel.* O'Sullivan v. New York Law School, 68 N.Y. Sup. Ct. 118, 22 N.Y.S. 663 (1893) (court upheld dismissal of law student on grounds that he argued with the dean the day before graduation); John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924) (court ruled university had no duty to make and prove charges against student expelled for "ringing cow bells"); Anthony v. Syracuse Univ., 224 A.D. 487, 231 N.Y.S. 435, 437 (1928) (court upheld dismissal of fourth-year student because she "caused a lot of trouble" at her sorority and did not act like "a typical Syracuse girl").

[24] See Buss, *supra* note 8, at 8-9. Noting that the student's deficiencies included her poor relationship with others, tardiness, nonparticipation in school activities, failure to take criticism maturely, and poor personal hygiene, Professor Buss argues that the United States Supreme Court created a weak distinction between academic and behavioral standards.

[25] Brookins v. Bonnell, 362 F. Supp. 379, 383 (E.D. Pa. 1973).

[26] See Corso v. Creighton Univ., 731 F.2d 529, 532 (8th Cir. 1984). The court ruled that "cheating on exams is clearly an academic matter." The student's lying about the cheating was interrelated, and the court held that it was reasonable to classify the matter as an academic offense. *See also* Garshman v. Pennsylvania State Univ., 395 F. Supp. 912, 921 (M.D. Pa. 1975) ("[A] determination as to the academic dishonesty of a student

The *Horowitz* and *Ewing* decisions demonstrate that the classification of a student's behavior as academic or disciplinary has substantial due process implications. Consequently, school officials should carefully consider all of the circumstances surrounding an incident before classifying the matter as academic or disciplinary. If the academic dishonesty matter includes factual disputes, university officials should grant the student the same procedural safeguards as those in a disciplinary matter. Moreover, established criteria, such as those found in a student handbook, code of conduct, or honor code, may help to classify a cheating violation. Such a document may set out the procedural guidelines with which to address the alleged infraction. Typically, such procedures grant more due process than is constitutionally required.

B. *Penalties for Disciplinary Violations*

Clearly, colleges and universities have authority to regulate both the academic and nonacademic behavior of students.[30] This power is justified in the frequently quoted judicial statement:

> In the field of discipline, scholastic and behavioral, an institution may establish any standards reasonably relevant to the lawful missions, processes, and functions of the institution. It is not . . . lawful . . . to prohibit the exercise of a right guaranteed

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. . . is a matter purely within the discretion of a college administrator."); McDonald v. Board of Trustees of Univ. of Ill., 375 F. Supp. 95, 104 (N.D. Ill. 1974) (Three medical school students, expelled for cheating, were denied relief because they were not "disciplined for conduct arguably falling within thescope of any constitutional protection."), *aff'd*, 503 F.2d 105 (7th Cir. 1974). *See generally* Roberts, *Public University Responses to Academic Dishonesty: Disciplinary or Academic*, 15 J.L. & EDUC. 369 (1986).

[27] See Jaksa v. Regents of Univ. of Michigan, 597 F. Supp. 1245, 1248 n.2 (E.D. Mich. 1984) (student accused of cheating on final examination), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986); *see also* Hall v. Medical College of Ohio, 742 F.2d 299 (6th Cir. 1984) (disciplinary hearing for academic dishonesty), *cert. denied*, 469 U.S. 1113 (1985).

[28] 597 F. Supp. 1245 (E.D. Mich. 1984), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986).

[29] *Id*. at 1248 n.2. The *Jaksa* court relied on the Supreme Court's reasoning that academic dismissals are "more subjective and evaluative than the typical factual questions presented in the average disciplinary decision." *Horowitz*, 435 U.S. at 90.

[30] In Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969), the leading case establishing the necessity of pre-existing written standards of student conduct, the court stated: "No one disputes the power of the University to protect itself by means of disciplinary action against disruptive students. Power to punish and the rules defining the exercise of that power are not, however, identical." *Id*. at 167.

> by the Constitution or a law of the United States to a member of the academic community . . . .[31]

When a student violates an established institutional standard,[32] either on or off campus grounds,[33] a university may impose an appropriate penalty. These penalties include reprimand, fine, removal from extracurricular activities, disciplinary probation, alteration of student status, suspension, or expulsion. A court's willingness to entertain a student's challenge to a disciplinary procedure rests on the identification of a protected interest. Usually, courts find that a liberty[34] or property[35] interest in the disciplinary sanction entitles a student to constitutional processes.

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[31] *See* JUDICIAL STANDARDS, *supra* note 12, at 145.

[32] *See id.*, which advocates:

> [Institutional] [s]tandards so established may apply to student behavior on and off the campus when relevant to any lawful mission, process, or function of the institution. By such standards of student conduct the institution may prohibit any action or omission which impairs, interferes with, or obstructs the mission, processes, and functions of the institution.

[33] Courts have consistently upheld an institution's authority to discipline students for off-campus misconduct. *See, e.g.*, Wimmer v. Lehman, 705 F.2d 1402, 1407 (4th Cir. 1983) (Naval Academy may dismiss midshipman for possession of marijuana); Hart v. Ferris State College, 557 F. Supp. 1379, 1380 (W.D. Mich. 1983) (college may hold disciplinary hearing for student arrested for selling drugs); Sohmer v. Kinnard, 535 F. Supp. 50, 51 (D. Md. 1983) (pharmacy school may dismiss student for cocaine possession); Krasnow v. Virginia Polytechnic Inst. & State Univ., 414 F. Supp. 55, 57 (W.D. Va. 1976) (university may discipline students for unlawful use or possession of drugs), *aff'd*, 551 F.2d 591 (4th Cir. 1977); Paine v. Board of Regents, 355 F. Supp. 199, 203 (W.D. Tex. 1972) (court upheld rule requiring automatic two-year suspension for any student placed on probation or convicted of illegal use, possession, or sale of drugs), *aff'd*, 474 F.2d 1397 (5th Cir. 1973); Esteban v. Central Mo. State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967) (due process required for campus prosecution of student for participation in off campus street demonstration), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); Wallace v. Florida A. & M. Univ., 433 So. 2d 600 (Fla. 1983) (university may dismiss pharmacy student following his conviction for intent to distribute cocaine); Kusnir v. Leach, 64 Pa. Commw. 65, 439 A.2d 223, 226 (1982) (college "may regard off-campus behavior as a reflection of a student's character and his fitness to be a member of the student body.").

See generally Annotation, *Misconduct of College or University Student Off Campus as Grounds for Expulsion, Suspension, or Other Disciplinary Action*, 28 A.L.R. 4TH 463 (1984); *See also* Annotation, *Participation of Student in Demonstration on or near Campus as Warranting Expulsion from School or College*, 32 A.L.R. 3D 864 (1970).

[34] Suspension from an educational institution involves a sufficient "liberty interest" to entitle a student to fourteenth amendment guarantees. *See Goss*, 419 U.S. at 575 (liberty interests were implied for high school students since their ten-day suspension "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."); Board of Regents v. Roth, 408 U.S. 564, 573 (1972) (A liberty interest develops when an institution imposes "a stigma or other disability that foreclose[s] [the] freedom to take advantage of other . . . opportunities."); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (Liberty interests include circumstances "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him.").

[35] A public school student may have a "property interest" in continuing his or her education at the institution in question. *See* Ewing v. Board of Regents of Univ. of

Courts have generally not required a college or university to adopt a less intrusive alternate punishment.[36] However, in *Gorman v. University of Rhode Island*,[37] the court ruled that the university could not, as a disciplinary sanction, require the student to seek counseling.[38] For a court to overturn a student's expulsion on substantive grounds, it must find the dismissal arbitrary or capricious.[39] University officials can avoid claims of arbitrary and capricious action if disciplinary penalties are within "reasonable and constitutional parameters."[40] Moreover, procedural protections that comport with due process requirements safeguard universities from acting arbitrarily and capriciously.

II. What Process Is Due

Following the rulings of *Dixon v. Alabama Board of Education*[41] and *Goss v. Lopez*,[42] lower courts agree that due process in student disciplinary matters minimally requires adequate notice, an opportunity for a hearing, and substantial evidence to support the penalty. Additional procedural protections, including preservation of the student's pre-hearing status, the right to proceed before an impartial hearing

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Mich., 742 F.2d 913, 915 (6th Cir. 1984), *rev'd on other grounds*, 106 S. Ct. 507 (1985) ("[A]n implied understanding that a student shall not be arbitrarily dismissed from his university is a property interest."); *Goss*, 419 U.S. at 574 "[T]he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest."); Stoller v. College of Medicine, 562 F. Supp. 403, 412 (M.D. Pa. 1983) (graduate student has a "property" interest in continuing a course of study), *aff'd per curiam*, 727 F.2d 1101 (3d Cir. 1984); Hall v. University of Minn., 530 F. Supp. 104, 107 (D. Minn. 1982) ("A student's interest in attending a university is a property right protected by due process.").

[36] *See* Bistrick v. University of S.C., 324 F. Supp. 942, 952 (D.S.C. 1971) (cited with approval in Herman v. University of S.C., 341 F. Supp. 226, 231 (D.S.C. 1971)).

[37] 646 F. Supp. 799 (D.R.I. 1986).

[38] "[T]he sanction of compulsory psychiatric treatment is a 'shocking extreme.' " *Id.* at 814.

[39] *See Dixon*, 294 F.2d at 157 (The power to expel students "is not unlimited and cannot be arbitrarily exercised."); Keys v. Sawyer, 353 F. Supp. 936, 940 (S.D. Tex. 1973); Connelly v. University of Vt., 244 F. Supp. 156, 159 (D. Vt. 1965). *But see* Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 92 (1978) (Court did not decide if courts have power to review academic decisions based on an "arbitrary or capricious" standard.).

[40] Nash v. Auburn Univ., 812 F.2d 655 (11th Cir. 1987) (quoting *Dixon*, 294 F.2d at 157).

[41] 294 F.2d 150 (1961), *cert. denied*, 368 U.S. 930 (1961). If school officials follow rudimentary elements of fair play, "the requirements of due process of law will have been fulfilled." *Id.* at 159.

[42] 419 U.S. 565 (1975). "[R]equiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action." *Id.* at 583.

board, the right to counsel, the right to confront witnesses, the right to invoke the privilege against self-incrimination, and the right to obtain a record of the proceedings are left to the court's discretion.[43] Although a court cannot order a university to adopt procedures beyond those required by the Constitution, due process requires that a university consistently apply those elements of the established procedure it promulgates.[44] However, a university does not necessarily violate the Constitution by breaching its procedural rules; courts may view this action as a type of harmless error.[45]

The United States Supreme Court in *Mathews v. Eldridge*[46] established a three-step analysis to determine what process is due. In *Mathews*, the Court balanced: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest; and (3) the public interest, weighed against the fiscal and administrative burden of any additional procedural requirements.[47] Many courts have applied this analysis to student disciplinary matters.[48] Its framework can guide college and university officials in developing or refining procedural aspects of student disciplinary matters.

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[43] *See also* Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1250 (E.D. Mich. 1984) ("[A] school disciplinary proceeding is not a criminal trial, nor is a student accused of cheating entitled to all the procedural safeguards afforded criminal defendants.") (citing Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 1000 (5th Cir. 1975)), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986); Betts v. Board of Educ., 466 F.2d 629, 633 (7th Cir. 1982); Norton v. Discipline Comm. of East. Tenn. State Univ., 415 F.2d 195, 200 (6th Cir. 1969) ("We do not believe that there is a good analogy between student discipline and criminal procedure."); Esteban v. Central Mo. State College, 415 F.2d 1077, 1090 (8th Cir. 1969) ("[S]chool regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure."), *cert. denied*, 398 U.S. 965 (1970); University of Houston v. Sabeti, 676 S.W.2d 685, 689 (Tex. Ct. App. 1984) ("The due process clause requires only fundamental fairness; it does not require that every dispute with a government agency be resolved as a lawsuit would be.").

[44] *See* Picozzi v. Sandalow, 623 F. Supp. 1571, 1579 (E.D. Mich. 1986); Ross v. Pennsylvania State Univ., 445 F. Supp. 147, 152 (M.D. Pa. 1978); Hillman v. Elliot, 436 F. Supp 812, 817 (W.D. Va. 1977); Everett v. Marcase, 426 F. Supp. 397, 401 (E.D. Pa. 1977).

[45] *Horowitz*, 435 U.S. at 92 n.8.

[46] 424 U.S. 319, 334-35 (1976). *Mathews* involved Social Security procedures for terminating a person's disability.

[47] 424 U.S. 319, 334-35 (1976). *See generally* Golden, *College Student Dismissals and the Eldridge Factors: What Process Is Due?* 8 J.C. & U.L. 497 (1981); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

[48] Many courts have cited the "Mathews" factors in their discussion of student due process rights in disciplinary matters. *See Horowitz*, 435 U.S. at 99; Nash v. Auburn Univ., 812 F.2d 655, 660 (11th Cir. 1987); Gabrilowitz v. Newman, 582 F.2d 100, 105 (1st Cir. 1978); Gorman v. University of R.I., 646 F. Supp. 799, 808 (D.R.I. 1986); *Picozzi*, 623 F. Supp. at 1577-79; Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1248 (E.D. Mich. 1984), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986); Hart v. Ferris State College, 557 F. Supp. 1379, 1387 (W.D. Mich. 1983); Bleicker v. Board of Trustees of Ohio State Univ., 485 F. Supp. 1381, 1387-88 (S.D. Ohio 1980); *Ross*, 445 F. Supp. at 153.

At times, a student receiving a severe penalty (usually suspension or dismissal) sues for an injunction seeking reinstatement or other relief. In those cases, a court reviews the student's pleadings and determines whether: (1) the student will suffer irreparable injury if it does not grant an injunction; (2) an injunction will substantially harm others; (3) the student is likely to succeed on the merits; and (4) the injunction would serve the public interest.[49] If the student meets these criteria and demonstrates a due process violation, the court can issue an injunction and order a de novo hearing.[50] However, if it finds no due process violations, the court should not issue an injunction and will uphold the college's decision.[51] As one court wrote: "[T]he only penalty, detriment, or requirement upon the university is that it go back and start over. If the proscribed conduct is properly established, a plaintiff in a case such as this wins no prizes as a result of the initial university misstep. . . ."[52]

A. *Student Status Prior to Disciplinary Hearing*

Administrative decisions regarding a student's status prior to a disciplinary hearing can invoke important concerns for university officials as well as the student. A student's alleged misconduct may create a genuine threat to campus safety. The unique aspect of the campus environment—where the violators, victims, and potential witnesses may live and attend classes together—necessitates a change in a student's status before a hearing. Given the short length of an academic term and the importance of attending classes, altering a student's pre-hearing status through suspension or dismissal may adversely affect the student.[53] On the other hand, the need for swift administrative action prior to a disciplinary hearing may outweigh the student's due process rights.[54] In a recent decision, *Picozzi v. Sandalow*,[55] the court concluded that persons in administrative positions "must have . . . the authority to take prompt and reasonable preliminary action that preserves the university's interest without finally and permanently depriving a student of his interest in continuing his education."[56] If valid interests are at stake, courts generally uphold a change in student status prior to a hearing.[57]

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[49] *See* Women's Community Health Center v. Cohen, 477 F. Supp. 542, 544 (D. Me. 1979) (quoted in McLaughlin v. Massachusetts Maritime Acad., 564 F. Supp. 809, 811 (D. Mass. 1983)); *see also* Mason County Medical Ass'n v. Knebel, 563 F.2d 256, 261 (6th Cir. 1977) (cited in Bleicker v. Board of Trustees of Ohio State Univ., 485 F. Supp. 1381, 1386 (S.D. Ohio 1980)).

[50] *See, e.g.*, Corso v. Creighton Univ., 731 F.2d 529, 533 (8th Cir. 1984); *Gorman*, 646 F. Supp. at 815; Brookins v. Bonnell, 362 F. Supp. 379, 384 (E.D. Pa. 1973).

[51] *See, e.g.*, Mahavongsanan v. Hall, 529 F.2d 448, 450 (5th Cir. 1976); *Picozzi*, 623 F. Supp. at 1571; *Hart*, 557 F. Supp. at 1391.

[52] Gardenhire v. Chalmers, 326 F. Supp. 1200, 1206 (D. Kan. 1971). *See also Gorman*, 646 F. Supp. at 804 (court vacated sanctions against the student and ordered a de novo disciplinary hearing that satisfied due process requirements); Bistrick v. University of S.C., 324 F. Supp. 942, 952 (D.S.C. 1971) (de novo hearing cures earlier procedural deficiencies) (citing with approval Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 868 (W.D. La. 1968).

[53] *See* American Association of University Professors, *Joint Statement on Rights and Freedoms of Students*, 53 AAUP BULL. 365 (1967), which recommends:

> Pending action on the charges, the status of the student should not be altered, or his right to be present on the campus and to attend classes suspended, except for reasons relating to his physical or emotional safety and well-being, or for reasons relating to the safety and well-being of students, faculty, or university property.

B. *Notice and Hearing*

Since *Dixon v. Alabama Board of Education*,[58] courts have consistently held that due process requires that student disciplinary hearings include notice and the opportunity for a hearing.[59] While the notice must be timely and inform the student of the proposed action and its grounds, courts have not prescribed minimal pro forma requirements for proper notice.[60] Clearly, courts will not hold the university to strict criminal law standards regarding notice,[61] including pre-hearing notice of the evidence.[62] Although some situations permit oral notice,[63] written notice containing a specific description of the charges and the time, date, and place of the hearing will best serve the educational institution and the student. Proper notice may benefit the institution if a student challenges its action. In identifying notice as a key element of due process, Judge Friendly suggested that "the more forthcoming the agency has been in disclosing its grounds, the stronger should be its position in asking curtailment of other procedures."[64]

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[54] The Court noted in *Goss* that a student who poses a threat to safety or creates continual disruptions may be removed immediately before notice and hearing. 419 U.S. at 582-83. The court in Picozzi v. Sandalow, 623 F. Supp. 1571, 1578 (E.D. Mich. 1986), relied on *Goss* in ruling that a law student was not entitled to a pre-suspension hearing. The dean conditioned the student's re-enrollment on successful completion of a polygraph test regarding a dormitory fire (in which the student was the chief suspect), or alternatively, an administrative hearing at the student's convenience. *Id. See also* Arnett v. Kennedy, 416 U.S. 134, 164 (1974); Winnick v. Manning, 460 F.2d 545, 547 (2d Cir. 1972); Stricklin v. Regents of Univ. of Wis., 297 F. Supp. 416, 420 (W.D. Wis. 1969).

[55] 623 F. Supp. 1571, 1579 (E.D. Mich. 1986). In ruling that the weight of the student's interest (unqualified certification of good standing) was less than that in *Goss*, the court held that less procedural protection is due. Furthermore, the dean's action was supported in protecting the law school community and in not misleading other law schools.

[56] *Id.*

[57] See Scheuer v. Rhodes, 416 U.S. 232, 246 (1974) ("[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office."); *see also* Buck v. Carter, 308 F. Supp. 1246, 1249 (W.D. Wis. 1970); Barker v. Hardway, 283 F. Supp. 228, 235 (S.D. W.Va. 1968), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); Jones v. Tennessee State Bd. of Educ., 279 F. Supp. 190, 202 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969).

[58] 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

[59] *Id.* at 156-57 ("The notice should contain a statement of the specific charges and grounds. . . .")

[60] See Nash v. Auburn Univ., 812 F.2d 655, 661 (11th Cir. 1987) ("There are no hard and fast rules by which to measure meaningful notice."); Esteban v. Central Mo. State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967) (The precise nature of the notice will vary "depending upon the circumstances of the particular case."), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); Greenhill v. Bailey, 519 F.2d 5, 9 (8th Cir. 1975) (lack of notice denied student due process); *Dixon*, 294 F.2d 150, 158 (notice should contain a statement of the specific charges and grounds); Herman v. University of S.C., 341 F. Supp. 226, 230 (D.S.C. 1971) ("[T]he student must be advised, in advance of the hearing, [of] the grounds of the charges against him."), *aff'd per curiam*, 457 F.2d 902 (4th Cir. 1972). *See also* 4 AM. JUR. LEGAL FORMS 2D *Colleges and Universities* § 60:125 (1971) (suspension or expulsion of students for misconduct).

Students also have a due process right to a hearing in a disciplinary matter.[65] The degree of formality afforded the student in the disciplinary hearing varies.[66] A closed hearing does not violate a student's due process rights.[67] Due process does not require that the ultimate decision-making authority actually hear the student.[68] Furthermore, changing a hearing before a disciplinary committee to one before a special committee established by university officials does not deny a student due process.[69] Without question, university officials must provide students with adequate notice and a hearing. While the degree of necessary formality differs, these components of due process need not rise to the level required in criminal proceedings.

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[61] Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 1000 (5th Cir. 1975).

[62] *Nash*, 621 F. Supp. at 954-55.

[63] *See Goss*, 419 U.S. at 581.

[64] Friendly, *Some Kind of Learning*, 123 U. PA. L. REV. 1267, 1281 (1975). *See also Nash*, 621 F. Supp. at 953-54.

[65] "[A] hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved." *Dixon*, 294 F.2d at 159. See Herman v. University of S.C., 341 F. Supp. 226, 230 (D.S.C. 1971) (student has a right to be heard in his own defense and to be present and present evidence), *aff'd*, 457 F.2d 902 (4th Cir. 1972); Esteban v. Central Mo. State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967) ("[T]he disciplinary authority [should] provide[] a fair opportunity for hearing the student's position, explanation, and evidence."), *aff'd*, 415 F.2d 1077. For historical treatment of this issue, see Annotation, *Right of a Student to Hearing on Charges Before Suspension or Expulsion from Educational Institution*, 58 A.L.R. 2D 903 (1958).

[66] While requiring the rudiments of an adversarial proceeding, *Dixon* also recognized the need to preserve the institution's interest: "[A] full-dress judicial hearing . . . might be detrimental to the college's educational atmosphere and impractical to carry out." 294 F.2d 150, 159. See Fain v. Brooklyn College of City Univ. of N.Y., 112 A.D.2d 992, 493 N.Y.S.2d 13, 14 (1985) ("Despite the informality of the hearing . . . petitioners were afforded a full opportunity to explain their actions and confront their accusers.").

[67] Hart v. Ferris State College, 557 F. Supp. 1379, 1389 (W.D. Mich. 1983). In denying the student's claim to a right for a public hearing, the court stated: "It is difficult to understand how the presence of such other students would decrease the risk of an erroneous expulsion but it is easy to see how their presence could be disruptive to the proceedings." *See also* Morale v. Grigel, 422 F. Supp. 988, 1004 (D.N.H. 1976) ("[O]pen hearings would avoid . . . the appearance of arbitrary decision-making violative of the Fourteenth Amendment."); Moore v. Troy State Univ., 284 F. Supp. 725, 731 (M.D. Ala. 1968).

[68] Sohmer v. Kinnard, 535 F. Supp. 50, 54 (D. Md. 1982) ("Student's right to be heard does not necessarily extend to an appearance before the ultimate authority in the disciplinary process.") (citing *Herman*, 341 F. Supp. at 230). In *Sohmer*, the court denied the student's contention that he was entitled to a full hearing before the Faculty Assembly, instead of the Student Grievance and Disciplinary Committee. 535 F. Supp. at 54.

[69] *Herman*, 341 F. Supp. at 232.

C. *Hearing Board*

The hearing board in student disciplinary matters frequently acts as both judge and jury. Members of the college community, including students, usually comprise the hearing board. Given the nature of the academic community, members of the hearing board may know the student outside the context of the disciplinary proceeding. Although the neutral and detached fact-finder of the criminal justice system is not necessary,[70] due process requires that hearing boards exercise independent judgment, so that they do more than ratify an administrator's evidentiary conclusions and disciplinary sanctions.[71]

Each student disciplinary case initially presumes the impartiality of university officials.[72] The hearing adjudicator's prior familiarity with the incident does not necessarily violate due process.[73] University officials violate due process only when the level of prior involvement creates a probability that the decision maker would decide the issue with partiality.[74] A student challenging the hearing board's action on grounds of bias or undue influence bears the burden of proving that the board acted improperly.[75] For a court to sustain this claim, the student cannot base the alleged prejudice on speculation or inference, but must support it with evidence from the record.[76] Because of this difficult burden, student challenges to hearing boards generally fail. Nonetheless, university officials should scrutinize the composition of a hearing board in each disciplinary matter. While a board member has no constitutional obligation of recusation, fundamental fairness may suggest this action as in the best interest of both parties.

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[70] *See* Blanton v. State Univ. of N.Y., 489 F.2d 377, 386 (2d Cir. 1973) (due process was not violated when a dean who had witnessed the incident at issue also sat on the hearing committee); Jones v. Tennessee State Bd. of Educ., 279 F. Supp. 190, 200 (M.D. Tenn. 1968) (in the absence of proof of malice or personal interest, a member of the hearing committee may give evidence against the accused student), *aff'd*, 407 F.2d 834 (6th Cir. 1969).

[71] *See* Lee v. Macon County Bd. of Educ., 490 F.2d 458, 461 (5th Cir. 1974) ("Formalistic acceptance or ratification of the principal's request or recommendation as to the scope of punishment, without independent Board consideration of what . . . the penalty should be, is less than full due process.").

[72] *See* Megill v. Board of Regents of State of Fla., 541 F.2d 1073, 1079 (5th Cir. 1976) ("An impartial decisionmaker is a basic constituent of minimum due process."); Winnick v. Manning, 460 F.2d 545, 548 (2d Cir. 1972) ("[A] fundamental requirement is that a hearing must be accorded before an impartial decision maker."); Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967) ("[A] fair hearing presupposes an impartial trier of fact.").

[73] *See* Nash v. Auburn Univ., 812 F.2d 655, 666 (11th Cir. 1987); *Megill*, 541 F.2d at 1079 (due process does not require per se disqualification of administrative hearing body); Duke v. North Tex. State Univ., 469 F.2d 829, 834 (5th Cir. 1972) (members of a hearing panel not disqualified solely because they were college employees or had participated in the investigation leading to the hearing), *cert. denied*, 412 U.S. 932 (1973); *Winnick*, 460 F.2d at 549 ("[T]he mere fact that the decision maker in a disciplinary hearing is also an administrat[or]" does not violate due process.); Hillman v. Elliot, 436 F. Supp. 812, 816 (W.D. Va. 1977) ("To be denied due process, plaintiff must show prejudice by the principal stemming from a source other than knowledge of the case."). *Contra Wasson* 382 F.2d at 813 ("[P]rior official involvement in a case renders impartiality most difficult to maintain."); *But cf.* Gonzales v. McUen, 435 F. Supp. 460, 464 (C.D. Cal. 1977) (due process violated because superintendent's presence at a school board deliberation "might operate as an inhibiting restraint.").

D. *Right to Legal Counsel*

In *Goss v. Lopez*, the United States Supreme Court stated that in more difficult disciplinary cases a university should afford a student "more formal procedures."[77] This dictum has created much confusion in the federal courts, resulting in a split on the issue of a student's right to legal representation at disciplinary hearings.[78] Generally, most courts do not find due process violations where university officials permit students to be represented by legal counsel,[79] but several courts have rejected the assertion that due process entitles a student to legal counsel at a disciplinary hearing.[80]

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[74] In Gorman v. University of R.I., 646 F. Supp. 799, 811-13 (D.R.I. 1986), the court ruled the hearing board to be insufficiently free of bias to satisfy due process requirements. The court found this bias because some voting members of the hearing panel had served on prior boards which unanimously found the same student guilty of disciplinary offenses. *See also* Cloud v. Trustees of Boston Univ., 720 F.2d 721, 725 (1st Cir. 1983) ("[I]n some cases, a Hearing Examiner may be so biased as to destroy the fairness of the hearing.").

[75] See Barker v. Hardway, 283 F. Supp. 228, 237 (S.D. W.Va. 1968) ("[T]he law indulges the presumption that school authorities act reasonably and fairly and in good faith in exercising the authority with which it clothes them, and casts the burden on him who calls their conduct into question to show that they have not been activated by proper motives."), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969).

[76] See Levitt v. University of Tex., 759 F.2d 1224, 1228 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 599 (1985); Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 1003 (5th Cir. 1975); *Duke*, 469 F.2d at 829.

[77] 419 U.S. at 584. Justice White, however, emphasized that *Goss* only involved short suspensions. The Court refused to outline due process requirements for longer suspensions and expulsions. The Court explained: "We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspension must afford the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident." *Id.* at 583-84.

[78] *Cf.* Annotation, *Right to Assistance by Counsel in Administrative Proceedings*, 33 A.L.R.3D 229, 286-89 (1970).

[79] See, e.g., Wimmer v. Lehman, 705 F.2d 1402, 1406 (4th Cir. 1983), *cert. denied*, 464 U.S. 992 (1983); Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992, 995 (5th Cir. 1975); Nash v. Auburn Univ., 621 F. Supp. 948, 958 (M.D. Ala. 1985), *aff'd*, 812 F.2d 655 (11th Cir. 1987); Cody v. Scott, 565 F. Supp. 1031, 1035 (S.D.N.Y. 1983); Turof v. Kibbee, 527 F. Supp. 880, 886 (E.D.N.Y. 1981); Adibi-Sadeh v. Bee County College, 454 F. Supp. 552, 556 (S.D. Tex. 1978); Morale v. Grigel, 422 F. Supp. 988,

Courts which recognize the right to counsel in disciplinary proceedings justify this position in several ways: (1) suspension or dismissal is a serious deprivation which mandates additional procedural safeguards;[81] (2) legal counsel can help protect the student's interest at the proceeding;[82] (3) permitting the student to have counsel minimally burdens the university;[83] (4) a student needs counsel to balance the university's use of an attorney;[84] (5) the hearing will employ complex rules of evidence or procedure;[85] (6) the disciplinary matter involves criminal activity;[86] and (7) the student has a statutory right to counsel under the particular state's law.[87]

1003 (D.N.H. 1976); Birdwell v. Schlesinger, 403 F. Supp. 710, 715-16 (D. Colo. 1975); Marin v. University of P.R., 377 F. Supp. 613, 618 (D.P.R. 1974); Center for Participant Educ. v. Marshall, 337 F. Supp. 126, 136 (N.D. Fla. 1972); Bistrick v. University of S.C., 324 F. Supp. 942, 952 (D.S.C. 1971); Speake v. Grantham, 317 F. Supp. 1253, 1259 (S.D. Miss. 1970), *aff'd per curiam*, 440 F.2d 1351 (5th Cir. 1971); Keene v. Rodgers, 316 F. Supp. 217, 221 (D. Me. 1970).

[80] *See* Greenhill v. Bailey, 519 F.2d 5, 9 (8th Cir. 1975) (The presence of attorneys "would serve no useful purpose. . . ."); Madera v. Board of Educ., 386 F.2d 778, 786 (2d Cir. 1967) (no right to counsel at a conference relating to the suspension of a student), *cert. denied*, 390 U.S. 1028 (1968); Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967) (Merchant Marine cadet had no right to counsel at disciplinary and expulsion hearings); Gorman v. University of R.I., 646 F. Supp. 799, 806 (D.R.I. 1986) (no right to legal counsel); Jaksa v. Regents of Univ. of Mich. 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) (no right to counsel at suspension hearing), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986); Kolesa v. Lehman, 534 F. Supp. 590, 594 (N.D.N.Y. 1982) (due process does not require counsel at hearing); Garshman v. Pennsylvania State Univ., 395 F. Supp. 912, 921 (M.D. Pa. 1975) (where elaborate procedures ensure fair results, courts should not "force the inclusion of a non-University individual into this delicate decision-making matter"); Haynes v. Dallas County Junior College Dist., 386 F. Supp. 208, 212 (N.D. Tex. 1974) (due process does not include a right to counsel in disciplinary hearings); Barker v. Hardway, 283 F. Supp. 288, 238 (S.D. W. Va. 1968) (right to counsel does not apply to proceedings that are "investigative" and not "adjudicative"), *aff'd per curiam*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); Due v. Florida A. & M. Univ., 233 F. Supp. 396, 403 (N.D. Fla. 1963) (due process does not require a university disciplinary committee to conduct a "full scale judicial trial" with qualified attorneys); *see also* JUDICIAL STANDARDS, *supra* note 12 at 147.

[81] *See* Esteban v. Central Mo. State College, 277 F. Supp. 649, 651, *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

[82] *Id.*

[83] See Marin v. University of P.R., 377 F. Supp. 613, 623 (D.P.R. 1973).

[84] See Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) (if an attorney had presented the university's case, the student "may have had a constitutional right to representation"), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986); *see also* French v. Bashful, 303 F. Supp. 1333, 1337-38 (E.D. La. 1969) (court upheld right to counsel where a senior law student prosecuted the complaints of misconduct).

[85] *See Jaksa*, 597 F. Supp. at 1245 (student may have been entitled to counsel if the hearing had been subject to complex rules of evidence or procedure).

[86] In Gabrilowitz v. Newman, 582 F.2d 100, 105-06 (1st Cir. 1978), the court held that the university denied a student due process by refusing permission to his attorney

In cases in which legal representation is considered a minimal due process requirement, courts differ as to whether the role of counsel is adversarial or advisory. Some decisions indicate that hearing boards should admit counsel in an advisory capacity,[88] give counsel a limited right of cross-examination,[89] or grant counsel full rights of cross-examination.[90] Notwithstanding that an attorney can conduct cross-ex-

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to assist the student's defense on a rape charge. In this situation, the dangers of self-incrimination and the student's "awareness of his own inability to evaluate the effect" of his statements on the pending criminal proceedings justify the presence of an attorney. *Id.* at 104. *See also* McLaughlin v. Massachusetts Maritime Acad., 564 F. Supp. 809, 811 (D. Mass. 1983) (court affirmed preliminary injunction to prevent cadet's dismissal until a subsequent hearing provided due process safeguard of counsel); *cf.* Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967) (non-criminal proceedings do not require representation by counsel); Nzuzve v. Castleton State College, 133 Vt. 225, 232, 335 A.2d 321, 366 (1975). *But see* Gorman v. University of R.I., 646 F. Supp. 799, 805-06 (D.R.I. 1986) (with no pending criminal charge, the university's denial of counsel did not violate the student's due process rights). *See generally* Comment, *Due Process Requires that Legal Counsel be Allowed to Advise a Student During University Disciplinary Proceedings Arising from the Same Facts as those of a Pending Criminal Charge*—Gabrilowitz v. Newman, 48 U. CIN. L. REV. 126 (1979).

[87] *See* Kusnir v. Leach, 64 Pa. Commw. 65, 439 A.2d 223, 227 (1982). The court ruled that the student's suspension was an "adjudication" within the meaning of the Administrative Agency Law. Because the college denied the student his statutory right to representation, the court remanded the case for new proceedings with the student's counsel.

[88] *See* Wimmer v. Lehman, 705 F.2d 1042, 1046 (4th Cir. 1983) (midshipman was not prejudiced by a refusal to allow counsel to examine and cross-examine witnesses, make objections, and argue the case), *cert. denied*, 464 U.S. 992 (1983); *e.g.*, Turof v. Kibbee, 527 F. Supp. 880, 886 n.12 (E.D.N.Y. 1981) (disciplinary committee not required to allow the student's counsel to conduct any witness examination); Esteban v. Central Mo. State College, 277 F. Supp. 649, 651-52 (W.D. Mo. 1967) (although due process requires that counsel be present at the hearing, only the student may question witnesses against him), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); University of Houston v. Sabeti, 676 S.W.2d 685, 689 (Tex. Ct. App. 1984) (due process not denied when student's counsel, a law student, was not allowed to speak at the expulsion hearing). *See generally* Comment, *Setting Boundaries for Student Due Process:* Rustad v. U.S. Air Force *and the Right to Counsel in Disciplinary Dismissal Proceedings*, 52 DEN. U.L. REV. 109, 114-15 (1984); Comment, *The Right to Counsel in Disciplinary Proceedings in Public and Private Educational Institutions*, 9 CUMB. L. REV. 751, 753-54 (1979).

[89] *See* Dillon v. Pulaski County Special School Dist., 468 F. Supp. 54, 58 (E.D. Ark. 1978), *aff'd*, 594 F.2d 699 (8th Cir. 1979). The student's attorney was not allowed to examine the teacher who had witnessed the student's behavior. The court ordered reinstatement on procedural due process grounds, expunged the record, and awarded one dollar in nominal damages. *Id.* at 58. *But see Jaksa*, 597 F. Supp. at 1253 (construing *Dillon* to limit cross-examination to confront the school or teacher having primary knowledge of the facts relevant to the disciplinary proceeding).

[90] *E.g.*, Fielder v. Board of Educ., 346 F. Supp. 722 (D. Neb. 1972) (right to counsel and cross-examination by counsel is at least "good technique"); Speake v. Grantham, 317 F. Supp. 1253, 1257-58 (S.D. Miss. 1970) (students and their counsel shall have the right of cross-examination), *aff'd per curiam*, 440 F.2d 1351 (5th Cir. 1971); French v. Bashful, 303 F. Supp. 1333, 1338 (E.D. La. 1969) (court limited its holding that a student be represented by "retained legal counsel as opposed to appointed counsel").

amination more effectively than a student, this procedural safeguard appears burdensome to many courts.[91] Although ruling that a pending criminal charge entitled a student to counsel at a disciplinary hearing, the First Circuit limited counsel's role to an advisory capacity.[92] The court noted that the presence of counsel should not burden the university because due process requires counsel only "for a truly unusual situation."[93]

Hart v. Ferris State College[94] specifically addressed whether due process entitles the student's counsel to cross-examine witnesses, or merely provide advice and consultation, with the student questioning witnesses. The court applied the *Mathews*[95] analysis to conclude that the probable value of the cross-examination by student's counsel is minimal compared to the significant burden it would impose.[96] The *Mathews* due process balancing test provides a compelling rationale for at least limited participation by a student's legal counsel. While the courts have established parameters to determine the need for counsel, courts have demurred the bounds for counsel's role to the university's discretion. The divided case law illustrates the need for the United States Supreme Court to resolve the split among the federal courts regarding the role of counsel in student disciplinary hearings.

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[91] *See* Gabrilowitz v. Newman, 582 F.2d 100, 106 (1st Cir. 1978) (counsel's limited role would not be very intrusive and would not place any financial or administrative burden upon the university); Dixon v. Alabama Bd. of Educ., 294 F.2d 150, 159 (1961) (the right to cross-examine witnesses, "might be detrimental to the college's educational atmosphere and impractical to carry out"), *cert. denied*, 368 U.S. 930 (1961).

[92] *Gabrilowitz*, 582 F.2d at 106. The court stated:

> Counsel's principal functions would be to advise appellee whether he should answer questions and what he should not say so as to safeguard appellee from self-incrimination; and to observe the proceeding first-hand so as to be better prepared to deal with attempts to introduce evidence from the hearing at a later criminal proceeding.

Id.

[93] *Id.*

[94] 557 F. Supp. 1379, 1386-87 (W.D. Mich. 1983). The court's ruling, however, was limited to denial of the student's request for preliminary injunctive relief. In emphasizing that it was not ruling on the merits of the student's claims, the court stated that additional relevant evidence could be presented. *Id.* at 1391.

[95] Mathews v. Eldridge, 424 U.S. 319, 335 (1976). *See supra* notes 46-48 and accompanying text. In *Gabrilowitz*, 582 F.2d at 105, the First Circuit applied *Mathews* and concluded that due process required a limited role for student's counsel.

[96] Hart v. Ferris State College, 557 F. Supp. 1379, 1387-88 (W.D. Mich. 1983). The court first held that: (1) the right to public education is a substantial one; and (2) the risk of error in the process employed by the college is relatively slight. The court noted that:

> [A] more active role by counsel would inevitably be more intrusive from the College's point of view. If plaintiff's counsel were permitted to cross-examine witnesses, the College might well find it desirable to have counsel ready to represent its own interest in insuring that witnesses not be harassed and that plaintiff's witnesses be subjected to equally searching cross-examination.

E. *Producing, Confronting, and Cross-Examining Witnesses*

Confronting and cross-examining witnesses is an important notion in traditional concepts of justice and fair play. In *Goldberg v. Kelley*[97] the United States Supreme Court stated: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[98] Both *Goss*[99] and *Dixon*[100] require that school officials inform a student who made the accusations. Traditionally, courts have found the student's right to confront the accuser in disciplinary hearings an essential element of due process.[101] Generally, this reasoning has been extended to require university officials to provide a list of witnesses and/or a summary of their testimony.[102] If university officials permit a student to confront and cross-examine witnesses, this right is usually limited to those witnesses who appear at the hearing.[103] Because a university has no subpoena power, a student has no right to require its officials to produce witnesses.[104] Although frustrating, a student's inability to compel the appearance of witnesses "does not rise to the level of a constitutional deprivation."[105]

Several courts have held that the fourteenth amendment does not require cross-examination of witnesses by the accused,[106] not even regarding biases,[107] in the hearing. Although holding that students have no right to cross-examination, the Second Circuit noted that if the case "had resolved itself into a problem of credibility, cross-examination of witnesses might have been essential to a fair hearing."[108] Some courts recognize a student's right to cross-examine witnesses.[109] These cases demonstrate the courts' concern that eyewitness accounts of student misconduct be balanced and thorough.

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[97] 397 U.S. 254 (1970).

[98] *Id.* at 269.

[99] 419 U.S. 565, 581 (1975).

[100] 294 F.2d 150, 158 (1961), *cert. denied*, 368 U.S. 930 (1961). The court added, however, that "[t]his is not to imply that . . . the right to cross-examine witnesses is required." *Id.*

[101] In a century-old decision, a court held that a student suspended for riotous conduct was "entitled to know what testimony had been given against him, and by whom it had been delivered, and that the proofs be made openly and in his presence, with a full opportunity to question the witnesses and to call others to explain or contradict their testimony." Hill v. McCauley, 3 Pa. Co. Ct. 77, 82 (1887).

[102] See Herman v. University of S.C., 341 F. Supp. 226, 230 (D.S.C. 1971), *aff'd per curiam*, 457 F.2d 902 (4th Cir. 1972) ("[The student] is entitled to the names of witnesses to be used against him."); Nash v. Auburn Univ., 812 F.2d 655, 663 (11th Cir. 1987) (A student is "not constitutionally entitled to advance notice of statements by witnesses who, along with the [student], were to appear at the hearing."). *But see* Whiteside v. Kay, 446 F. Supp. 716, 721 (W.D. La. 1978) (School officials are "not required to provide students with a list of witnesses and a summary of their testimony.").

[103] See Boykins v. Fairfield Bd. of Educ., 492 F.2d 697, 701-02 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

[104] See Hart v. Ferris State College, 557 F. Supp. 1379, 1389 (W.D. Mich. 1983) ("It is not clear how the College could be required to compel the attendance of witnesses over whom it has no power by subpoena or otherwise.").

[105] Turof v. Kibbee, 527 F. Supp. 880, 886 (E.D.N.Y. 1981).

[106] *See Boykins*, 492 F.2d at 701 (no right to confront or cross-examine witnesses exists in a high school disciplinary action); *Herman*, 341 F. Supp. at 230 ("[The student] may not be necessarily entitled to be confronted by the witnesses at the hearing"); Dixon v. Alabama Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961) (due process does not require the right to cross-examine witnesses), *cert. denied*, 368 U.S. 930 (1961); *accord* Blanton

The university has a stronger case when it wishes to safeguard student witnesses.[110] Some courts have held that when accusers are fellow students, not school officials, they may remain anonymous to guard against reprisals.[111] While this safeguard has merit, it may force an accused student to answer to an unnamed accuser or to written allegations. This solution is, at best, tenuous and not advised.

F. *Student's Privilege Against Self-Incrimination*

Although a disciplinary hearing provides the student an opportunity to explain the alleged misconduct, some students claim a right to be silent during the hearing. University officials may not deny a student the right to remain silent. In *Picozzi v. Sandalow*[112] the court ruled that the law school dean did not deprive the student of his privilege against self-incrimination by offering the student the choice of a polygraph test or a hearing. The court also noted that "even though a person may assert the privilege against self-incrimination during a civil proceeding, the privilege protects a person from only criminal exposure."[113]

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v. State Univ. of N.Y., 489 F.2d 377, 385 (2d Cir. 1973); Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) ("The Constitution does not confer on [the student] the right to cross-examine his accuser in a school disciplinary hearing."), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986).

[107] *See* Gorman v. University of R.I., 646 F. Supp. 799, 807 (D.R.I. 1986) (because the student was permitted to cross-examine all adverse witnesses, the court found no due process violations with respect to cross-examination).

[108] Winnick v. Manning, 460 F.2d 545, 550 (2d Cir. 1970).

[109] *See* Dillon v. Pulaski County Special School Dist., 468 F. Supp. 54, 58 (E.D. Ark. 1978) (where witness testimony was critical, "due process clearly demanded that the student be given an opportunity to question" the witness), *aff'd*, 594 F.2d 699 (8th Cir. 1979); Gonzales v. McUen, 435 F. Supp. 460, 469 (C.D. Cal. 1977) ("[D]ue process does not permit admission of *ex parte* evidence by witnesses not under oath and not subject to examination by the accused student."); Marin v. University of P.R., 377 F. Supp. 613, 623 (D.P.R. 1974) (student may "cross-examine opposing witnesses with the assistance of counsel").

[110] *See Jaksa*, 597 F. Supp. at 1253; Graham v. Knutzen, 351 F. Supp. 642, 666 (D. Neb. 1972); *see also* Hannah v. Larche, 363 U.S. 420, 442 (1960).

[111] *See Dillon*, 468 F. Supp. at 58 ("[T]he need for anonymity of student accusers, who might otherwise be the victim of reprisals from fellow students, could prevail over the right to confrontation."), *aff'd per curiam*, 594 F.2d 699 (8th Cir. 1979); *see also* Fielder v. Board of Educ., 346 F. Supp. 722 (D. Neb. 1972) (teacher witness); DeJesus v. Penberthy, 344 F. Supp. 70 (D. Conn. 1972) (student witness).

[112] 623 F. Supp. 1571, 1582 (E.D. Mich. 1986).

[113] *Id. See, e.g.*, Kastigar v. United States, 406 U.S. 441, 444 (1972).

Frequently, students assert their privilege against self-incrimination when they attempt to postpone the college disciplinary hearing until the court resolves a related criminal charge. A student may argue that a disciplinary hearing, held prior to resolution of the criminal charges, forces the student to testify to avoid expulsion. Since such testimony may be used against the student at the subsequent criminal trial, it may deny fifth amendment rights. The First Circuit metaphorically described the student's dilemma in such a situation:

> [T]he hearing procedures do not place appellee 'between the rock and the whirlpool.' He can, if he wishes, stay out of the stream and watch the proceedings from dry land. But, if he does so, he forfeits any opportunity to control the direction of the current. Appellee must decide whether or not to testify at the hearing with the knowledge that, if he does, his statements may be used against him in the criminal case.
>
> . . . .
>
> . . . Although the choice facing him is difficult, that does not make it unconstitutional.[114]

Courts which do not require postponing the student's disciplinary hearing until completion of the criminal proceedings,[115] rely on the Supreme Court's pronouncement in *Garrity v. New Jersey*[116] that the state may not fire police officers for invoking their privilege against self-incrimination during a civil hearing regarding police conduct.[117] Following *Garrity* and its progeny, the court in *Hart v. Ferris State College* ruled that the college did not violate due process in its failure to adjourn the disciplinary hearing until resolution of the student's pending criminal charges.[118] In refusing to grant an injunction against the proposed disciplinary proceeding, the court stated: "It is clear that plaintiff is permitted to remain silent. It appears that her silence may not be used against her. There is no indication that the silence of an accused will be considered as either pointing to or being conclusive of guilt."[119]

Additionally, other courts have explained that university-imposed discipline need not await the outcome of other proceedings because this result fairly balances all competing interests.[120] University officials may proceed with a disciplinary hearing, and not violate a student's privilege against self-incrimination, even pending a student's criminal proceedings. This course of action allows the university to demonstrate that it takes the allegations seriously. Moreover, because criminal cases can take over a year to be resolved, delay of the disciplinary hearing may cause students to lose respect for the rules of conduct. Consequently, in most circumstances, university officials should not delay the disciplinary proceeding.

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[114] Gabrilowitz v. Newman, 582 F.2d 100, 104 (1st Cir. 1978) (citation omitted).

[115] *See* Wimmer v. Lehman, 705 F.2d 1402, 1407 (4th Cir. 1983), *cert. denied*, 464 U.S. 992 (1983); *Gabrilowitz*, 582 F.2d at 104; Keene v. Rodgers, 316 F. Supp. 217, 221-22 n.4 (D. Me. 1970); Furutani v. Ewigleben, 297 F. Supp. 1163, 1165 (N.D. Cal. 1969); Nzuzve v. Castleton State College, 133 Vt. 225, 335 A.2d 231, 325-26 (1975); Goldberg v. Regents of Univ. of Cal., 248 Cal. App. 2d 867, 57 Cal. Rptr. 463, 474 (1967).

[116] 385 U.S. 493 (1967).

[117] *Id.* at 500.

[118] 557 F. Supp. 1379, 1384 (W.D. Mich. 1983). The prosecutor publicly stated his intention to subpoena any testimony at the student disciplinary hearing which pertained to the related criminal charge.

[119] *Id.* at 1385.

G. *Substantive Evidence*

University officials bear the burden of proof in producing evidence to sustain the charges against the student and must base their disciplinary decisions on substantial evidence.[121] Substantial evidence requires "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[122] While the substantial evidence standard remains the norm, one federal district court found this standard too low and recommended that university officials adopt the higher standard of "clear and convincing evidence."[123] Because classrooms are not courtrooms, student disciplinary proceedings need not conform to the formal procedures and rules of evidence which govern court trials. Although the United States Supreme Court has been silent concerning evidentiary rights in the disciplinary dismissal context, some federal district courts have addressed this issue.[124] Very few cases have addressed the admissibility of hearsay evidence in a student disciplinary proceeding.[125] School officials need not employ formal evidentiary procedures in student disciplinary hearings. Even if a student's alleged misconduct is the basis of a criminal charge, courts do not require school officials to adopt the burden of proof applicable to criminal proceedings. Unless an institution's code of conduct provides otherwise, basing a decision on substantial evidence is acceptable.

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[120] Educational institutions have both

> a need and a right to formulate their own standards and to enforce them; such enforcement is only coincidentally related to criminal charges and the defense against them. To hold otherwise would . . . lead logically to the conclusion that civil remedies must, as a matter of law, wait for determination until related criminal charges are disposed of.

Nzuzve, 335 A.2d at 325. The *Nzuzve* court relied on Goldberg v. Regents of Univ. of Calif., 248 Cal. App. 2d 167, 57 Cal. Rptr. 463 (1967), in ruling that discipline imposed by a college or university need not await the outcome of other proceedings. *See generally* DeVita v. Sills, 422 F.2d 1172, 1178-80 (3d Cir. 1970) (The fifth amendment does not require postponement of civil proceedings whenever related criminal charges are pending.).

[121] *See* Slaughter v. Brigham Young Univ., 514 F.2d 622, 625 (10th Cir. 1975) (some weight must be given to determining the facts when there is substantial evidence), *cert. denied*, 423 U.S. 898 (1975); Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (due process requires that the decision of the authorities be based upon substantial evidence); Herman v. University of S.C., 341 F. Supp. 226, 230 (D.S.C. 1971) ("No serious disciplinary action can be taken unless it is based on substantive evidence."), *aff'd per curiam*, 457 F.2d 902 (4th Cir. 1972); Center for Participant Educ. v. Marshall, 337 F. Supp. 126, 136 (N.D. Fla. 1972) ("[I]n order to satisfy due process requirements, a university disciplinary proceeding should afford the student . . . punishment based only upon substantial evidence adduced at the hearing."); Speake v. Grantham, 317 F. Supp. 1253, 1281 (S.D. Miss. 1970) (no disciplinary action may be taken on grounds not supported by substantial evidence), *aff'd*, 440 F.2d 1351 (5th Cir. 1971). *But see* McDonald v. Board of Trustees of Univ. of Ill., 375 F. Supp. 95, 102 (N.D. Ill. 1974) (court espoused the "same evidence" due process standard); *accord* Gorman v. University of R.I., 646 F. Supp. 799, 814 (D.R.I. 1986); *cf.* Smyth v. Lubbers, 398 F. Supp. 777, 799 (W.D. Mich. 1975) (substantial evidence standard is constitutionally inadequate because it "provides no intelligible standard" or is "lower than what is constitutionally required").

[122] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (cited with approval in Sill v. Pennsylvania State Univ., 318 F. Supp. 608, 621 (1970), *aff'd*, 462 F.2d 463 (3d Cir. 1972)).

H. *Record of Proceedings and Statement of Decision*

While some courts require that a university furnish a student with a transcript of the disciplinary proceedings,[126] other courts grant a party only the right to make a record of the proceedings,[127] and still other courts find no due process rights to a hearing transcript.[128] Applying the *Mathews* test to this issue,[129] the court in *Gorman v. University of*

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[123] *Smyth*, 398 F. Supp. at 797-99. In analyzing the hierarchical standards of proof (preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt), one commentator concluded that the "clear and convincing" standard provides a "safe harbor" for campus disciplinary proceedings. *See* Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J.C. & U.L. 71, 81 (1985).

[124] In Morale v. Grigel, 422 F. Supp. 988, 1001 (D.N.H. 1976), and Ekelund v. Secretary of Commerce, 418 F. Supp. 102, 106 (E.D.N.Y. 1976), the courts refrained from applying the exclusionary rule to evidence in student dismissal proceedings. *Contra Smyth*, 398 F. Supp. at 795 (evidence seized in the illegal search of a student's room may not be used in the college disciplinary proceedings).

[125] Cases which discuss hearsay are limited to secondary schools. *See generally* Annotation, *Admissibility of Hearsay Evidence in Student Disciplinary Proceedings*, 30 A.L.R. 4TH 935 (1984).

[126] See Marin v. University of P.R., 377 F. Supp. 613, 623 (D.P.R. 1973) (requiring that the proceedings be transcribed).

[127] See Givens v. Poe, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (due process requires the right to make a record); Esteban v. Central Mo. State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967) ("[E]ither side may, at its own expense, make a record of the events at the hearing."), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

[128] See Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) (due process does not require the university to provide a verbatim transcript), *aff'd per curiam*, 787 F.2d 590 (6th Cir. 1986); Sohmer v. Kinnard, 535 F. Supp. 50, 54 (D. Md. 1982) ("[N]one of the student discipline cases suggest that a full transcript of the hearing is required."); *Morale*, 422 F. Supp. at 1003 (college's failure to make a record of the hearing did not amount to constitutional error); Whitfield v. Simpson, 312 F. Supp. 889, 894 (E.D. Ill. 1970) (no need for stenographic or mechanical recording of the proceedings).

[129] "[T]he interests at stake are substantial, the risk of error is significant, and the corrective value of a verbatim record is similarly significant." 646 F. Supp. at 808. *See supra* notes 46-48 and accompanying text.

Rhode Island[130] ruled that "where no other verbatim record of the proceeding will be made available, a student threatened with a year-long disciplinary suspension from a public university has the right to tape-record the disciplinary hearings at his or her own expense."[131] However, due process does not require the university to provide a free transcript of the hearing to the student.[132]

The institution's appellate procedure may determine whether a record of the hearing must be provided. Where appellate procedures provide a review of the hearing board's decision, as opposed to a de novo hearing, "the student needs a thorough and accurate record of the hearings below to maintain a fair defense on appeal."[133] However, where the university does not provide a record, a court may require a de novo hearing.[134] Some courts do not require a statement of the hearing panel's final decision.[135] Nonetheless, if the hearing is not before the body that will make the ultimate disciplinary decision, then the hearing panel should file a written report of its findings and make this report available to the student.[136] While courts do not generally require that universities provide legal transcripts of student disciplinary hearings, university officials should at least keep a taped record of the proceedings.

CONCLUSION

Student due process rights in college and university disciplinary matters vary in degree and kind. Depending upon the nature of the dispute, the courts accord differing levels of procedural protection to the student.[137] To protect both the institution and the student, university officials must provide procedural safeguards for student disciplinary matters. Although case law demonstrates that notice, a hearing, and substantive evidence are required, courts repeatedly emphasize that due process in student disciplinary matters does not have to meet the standards of the criminal law model.[138]

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[130] 646 F. Supp. 799 (D.R.I. 1986).

[131] *Id.* at 808.

[132] *Id.*

[133] *Id.* at 809.

[134] *See* Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 768 (W.D. La. 1968); *see also* Morale v. Grigel, 422 F. Supp. 998, 1003 (D.N.H. 1976) (although the court required written reasons for the student's suspension, the college's failure to make a record did not amount to constitutional error where the student's appeal right consisted of a de novo trial).

[135] *See Jaksa*, 597 F. Supp. at 1255 ("Articulating the obvious to plaintiff would not reduce a risk of erroneous deprivation of plaintiff's rights."); Bleicker v. Board of Trustees of Ohio State Univ., 485 F. Supp. 1381, 1387-88 (S.D. Ohio 1980) (written minutes from student council hearing does not violate due process); Herman v. University of S.C., 341 F. Supp. 226, 232 (D.S.C. 1971) (no requirement in "law or reason" for the Board to issue written findings of fact or conclusions of law similar to those in the Federal Rules of Civil Procedure), *aff'd*, 457 F.2d 902 (4th Cir. 1972).

[136] *See* Dixon v. Alabama Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961) ("[T]he results and findings of the hearing should be presented in a report open to the student's inspection."), *cert. denied*, 368 U.S. 930 (1961); *Morale*, 424 F. Supp. at 1003 (written reasons for a student's suspension are constitutionally mandated). *See also* 5 AM. JUR. PL. AND PR. FORMS (REV) *College and Universities* Form 22 (1968) (grounds for expulsion found at duly conducted hearing).

University officials must walk a fine line between the competing interests in a student disciplinary matter. While fundamental fairness should be the overriding consideration, expediency, expense, and a desire to avoid litigation also raise concerns for the institution. Consequently, colleges and universities should develop policies, in view of judicial decisions, that meet these needs. Due process in student disciplinary matters presents a volatile paradox: bypassing procedural safeguards may invite academic tyranny, while a preoccupation with due process may result in harmful proceduralism. Distrust creates more formalized due process procedures in schools, whereas nonformalism is founded on trust.[139] While school officials continue to develop or refine disciplinary procedures, they must maintain a careful balance. Ultimately, a good student disciplinary procedure goes beyond constitutional minima to avoid arbitrariness and absolutism and to promote fairness, trust, and flexibility.

*Lisa L. Swem**

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[137] One commentator warns: "Although the trend toward written codes is a sound one, legally speaking, because it gives students fairer notice of what is expected from them and often results in a better conceived and administered system, written rules also provide a specific target to aim at in a lawsuit." W. KAPLIN, THE LAW OF HIGHER EDUCATION 292 (1985). *See also* Pavela, *Limiting the "Pursuit of Perfect Justice" on Campus: A Proposed Code of Student Conduct*, 6 J.C. & U.L. 137 (1979).

[138] *See supra* note 43.

[139] Professor Gilmore stated:

> The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. . . . The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.

G. GILMORE, THE AGES OF AMERICAN LAW 111 (1977) (quoted in Yodof, *Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools*, 1981 WIS. L.R. 891, 923).

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COMMENTARY

HATE SPEECH IN COLLEGES AND UNIVERSITIES—THE AFTERMATH OF *R.A.V. v. CITY OF ST. PAUL, MINNESOTA* *

by

Valerie L. Brown, J.D., M.A.**

In June 1992, the Supreme Court ruled, in *R.A.V. v. City of St. Paul, Minnesota*[1] that the city's Biased–Motivated Crime Ordinance, which prohibits the display of a symbol which one knows "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender" is unconstitutional.[2] In the 9–0 decision, led by Justice Antonin Scalia, the Court reasoned that the ordinance prohibits otherwise permitted speech solely on the basis of the subject the speech addresses. Justices White, Blackmun, and Stevens filed separate concurring opinions. Justice White held that the ordinance could be "easily" ruled unconstitutionally overbroad based on established First Amendment principles. Justice Blackmun caustically chided the majority Court for its emphasis on the "politically correct speech." He too agreed that the ordinance was overbroad. Justice Stevens in a separate concurring opinion, too, held that the ordinance is content-based regulation of speech.

This decision is viewed by many as one of the most far-reaching interpretations of the First Amendment, especially in light of the competing visions espoused by members of the Court. The issue of whether the government may declare that some speech is so hateful and vitriolic that it may be punished as a crime fractured the justices in many directions.

Racism, sexism, homophobia and anti-Semitism are on the rise in university and college campuses.[3] College and university officials must provide an appropriate institutional response to acts of prejudice since they are responsible for ensuring equal educational opportunity, preventing interference with the educational process, protecting students from harm, both physical and psychological, and maintaining order on campus. Hate speech is designed to inflict pain on others and disrupts the academic environment by interfering with an individual's full access to the university environment.

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* The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 79 Ed.Law Rep. [697] (March 11, 1993).

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[1] *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. ——, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).

[2] 505 U.S. at ——, 112 S.Ct. at 2540.

[3] William Celis, III, *Universities Reconsidering Bans on Hate Speech*, N.Y. Times, June 24, 1992 at A13. *See also*, New York Times Editorial, *Loosing Hateful Speech*, June 24, 1992 at A20, and Linda Greenhouse, *The Court's Two Visions of Free Speech*, N.Y. Times, June 24, 1992, at A13.

Colleges and universities must now reassess how far the institution may go to guard civil rights by limiting freedom of speech. *R.A.V.* raises interesting questions as to whether institutions may regulate speech which could be viewed as racist or sexist or simply not "politically correct." College and university codes of student conduct built on one-on-one infractions are considered more likely to survive legal challenge if they closely follow state and federal anti-discrimination laws.[4]

Part one of this article discusses the factual background of *R.A.V. v. City of St. Paul, Minnesota.* Part two discusses the factual background of *Doe v. University of Michigan.* Part three discusses leading cases in the area of student First Amendment rights. Part four draws conclusions and assesses future trends.

PART I: SUMMARY OF FACTS OF *R.A.V. v. CITY OF ST. PAUL, MINNESOTA*

Robert Viktora and several teenagers assembled and burned a cross made of broken chair legs inside the fenced yard of a black family that lived across the street from the house where Viktora was staying. The City of Saint Paul, charged Viktora under the city's Biased–Motivated Crime Ordinance, which provides:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[5]

The city could have charged Viktora under several other statutes, including terroristic threats, arson and criminal damage to property.[6] The city proceeded to prosecute under the bias crime ordinance to send a message to potential violators and to illustrate the city government's abhorrence of biased-motivated crime.

Viktora moved for dismissal on the grounds that the ordinance was substantially overbroad and impermissibly content-based and therefore facially invalid under the First Amendment. The trial court granted this motion, but the Minnesota Supreme Court reversed.[7] The court rejected Viktora's overbreadth argument as construed in prior Minnesota cases. The modifying phrase of the ordinance "arouses anger, alarm or resentment in others", limits the ordinance to conduct that amounts to "fighting words" *i.e.*, "conduct that itself inflicts injury or tends to incite immediate violence . . . ," and therefore the ordinance concerns expression that is not protected by the First Amendment.[8] Further, the court said that the ordinance was not impermissibly content-based because it was "narrowly tailored" to accomplish a "compelling governmental interest in protecting the community against biased-motivated threats to public safety and order".[9] The United States

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[4] *Id.*

[5] 505 U.S. at ——, 112 S.Ct. at 2541.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* at ——, 112 S.Ct. at 2543.

Supreme Court reversed the Minnesota Supreme Court, basing its rationale on several free speech arguments.

Initially, the Court explained that the First Amendment generally prevents the government from proscribing speech or expressive conduct. Content-based regulations are presumptively invalid. Nevertheless, some speech "because of their constitutionally prescribable content" have no constitutional protection.[10] For example, obscenity, defamation and fighting words are constitutionally-content prescribable. Accordingly, the Court reasoned, the government may proscribe liable; but it may not make the further content discrimination of proscribing only liable critical of the government.[11] Similarly, non-verbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas, burning a flag in violation of an ordinance against dishonoring the flag is not.[12] Additionally, reasonable manner, time and place restrictions are permitted, but only if they are "justified without reference to the content of the regulated speech." [13] Although the Court made clear the general First Amendment prohibition of content regulation of speech, it also recognized numerous instances where regulation of speech and expressive conduct is wholly constitutional and appropriate. For example, speech may be regulated because of its action though not on the basis of the ideas conveyed.[14] Also, "underinclusive" regulation of speech is appropriate, such as where the State prohibits prescribable speech in a limited market.[15] Further, "content discrimination" or the prohibition of speech based on ideas expressed may be appropriate, but in limited circumstances depending upon whether the speech is within a prescribable area or is fully protected.[16] Also, it is permissible the Court said to accord differing treatment to a subclass of prescribable speech where the subclass is associated with the "secondary effects" of speech so that regulation is "justified" without reference to the content of speech.[17] For example, a State may permit all obscene live performances except those involving minors. Additionally, content-based regulation of a sub-category of prescribable speech is appropriate—for example—laws against treason—because the prohibited action concerns conduct not speech.[18] Another area of permissibly regulated speech the Court points to is "sexually derogatory fighting words" which may be in violation of the Title VII prohibition against sexual discrimination and employment.[19] Accordingly, the Court concluded that there are many justifiable reasons to selectively restrict speech because of its content. The Court made clear that the State has great latitude in restricting speech even on a content basis provided that "the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot".[20]

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[10] *Id.*

[11] *Id.* at ——, 112 S.Ct. at 2543.

[12] *Id.* at ——, 112 S.Ct. at 2544.

[13] *Id.*

[14] *Id.* at ——, 112 S.Ct. at 2545.

[15] *Id.*

[16] *Id.* at ——, 112 S.Ct. at 2546.

[17] *Id.*

[18] *Id.*

[19] *Id.* at ——, 112 S.Ct. at 2546.

[20] *Id.* at ——, 112 S.Ct. at 2547.

The majority of the U.S. Supreme Court said that even if they accepted the Minnesota Supreme Court's narrow construction of the ordinance as regulating fighting words—expression without constitutional protection—the Court concluded that the ordinance is unconstitutional for several reasons. Firstly, the Court said that the ordinance did not fall within any of the above exceptions to the First Amendment prohibitions of speech or within the "general exception for content discrimination that does not threaten the censorship of ideas." [21] Secondly, the ordinance prohibits fighting words "on the basis of race, color, creed, religion, or gender." Fighting words directed at persons because of their "political affiliation, union membership, or homosexuality" would be permissible under the ordinance.[22] The city of St. Paul cannot prohibit expression of views on "disfavored topics." [23] Thirdly, the ordinance is beyond "content discrimination;" it is "viewpoint discrimination." [24] The Court said the ordinance prohibits fighting words that contain messages of "bias-motivated hatred" and messages "based on virulent notions of racial supremacy" and expressions of "group hatred." [25] Fourthly, the Court said the ordinance selectively proscribes only those fighting words that communicate messages of racial, gender, or religious intolerance, thus "handicapping the expression of particular ideas." [26] Fifthly, the Court disagreed with St. Paul's assertion that the ordinance was intended "to protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against." [27] The Court disagreed that the ordinance fell within the exception that allows content discrimination aimed only at the "secondary effects" of speech.[28] Citing *Boos v. Barry* [29] (holding a District of Columbia code prohibiting picketing within 500 feet of a foreign embassy content-based restriction on political speech in violation of the First Amendment), the Court held that a "listener's reaction" and the "emotive impact of speech on its audience is not a secondary effect." [30] Finally, the Court fully acknowledged that the ordinance promotes a compelling state interest—"to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish", and made clear that the act of cross burning is "reprehensible." [31] Nevertheless, the "danger of censorship" presented by a facially content-based statute requires that that weapon be employed only where it is "necessary to serve the asserted (compelling) interest." [32] In this case, the Court said that there were "adequate content-neutral alternatives." [33]

SUMMARY OF CONCURRING OPINIONS

Justices White, Blackmun and O'Connor joined (with Justice Stevens joining excepting in part I(A)) in a concurring opinion. These three Justices, in a strongly worded opinion, reasoned that the ordinance is unconstitutional because it is overbroad, criminalizing not only "unprotected expression but expression protected by the First Amendment."[34] The Justices criticized the majority, indicating that case precedent was cast aside in forming a conclusion, and reasoned that the ordinance could have been "easily" ruled unconstitutional on overbreadth grounds and established First Amendment law.

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at ——, 112 S.Ct. at 2548.

[26] *Id.* at ——, 112 S.Ct. at 2549.

[27] *Id.*

[28] *Id.*

[29] *Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988).

[30] 505 U.S. at ——, 112 S.Ct. at 2549.

[31] *Id.* at ——, 112 S.Ct. at 2550.

[32] *Id.* at ——, 112 S.Ct. at 2549.

[33] *Id.* at ——, 112 S.Ct. at 2550.

The St. Paul ordinance prohibits expression which "by its very utterance causes anger, alarm, or resentment."[35] The Court said "the mere fact that expressive activity causes hurt feelings, offense or resentment does not render the expression unprotected."[36] The ordinance criminalizes not only unprotected speech, but speech that might only hurt feelings or cause resentment. By concluding that prescribable speech (fighting words) cannot be regulated on the basis of content, the majority elevates fighting words to a greater constitutional protection than commercial speech, the justices said.[37]

Justice Blackmun, writing in a separate concurring opinion, criticized the majority for "deciding that a State cannot regulate speech that causes great harm unless it also regulates speech that does not."[38] He continued that by prohibiting the "categorization" of speech (some speech being entitled to more or less protection), the protection "across the board" will be reduced. Finally, he said that the majority "manipulated doctrine to strike down an ordinance whose premise it opposed, namely, that racial threats and verbal assaults are of greater harm than other fighting words".[39]

Justice Stevens disagreed with the majority that all content-based regulation is presumptively unconstitutional. For example, in *Young v. American Mini Theatres,*[40] the Court upheld zoning ordinances that regulated movie theaters based on the content of the films shown. He disagreed with the majority that the ordinance is discriminatory on the basis of viewpoint and content. He also disagreed with Justice White that all fighting words are unprotected. Further, he concluded that if the ordinance were not unconstitutionally overbroad (criminalizing constitutionally protected speech), he would agree that "a selective, subject-matter regulation on prescribable speech is constitutional."[41] He maintained that the ordinance regulates speech not on the basis of subject matter or viewpoint, but on the basis of the harm the speech causes. Subject matter regulation of speech is constitutional, said Justice Stevens. The regulation, for example of commercial speech is "widespread and largely unproblematic."[42]

PART II: SUMMARY OF *DOE v. UNIVERSITY OF MICHIGAN*

R.A.V. symbolizes the difficulties many cities may face in sending strong public messages to deter bias-motivated crime. Similarly, colleges and universities face equally challenging problems in confronting incidence of bias crime on campus. A 1989 federal case described below illustrates the problems when colleges and universities adopt policies barring bias-motivated expression on campus. In *Doe v. University of Michigan*,[43] the U.S. District Court confronted the question of whether the university's policy on discrimination was so overbroad and vague as to be violative of the First Amendment. Both *R.A.V.* and *Doe* have many similarities, including an attempt to enforce a facially overbroad prohibition on freedom of expression in violation of the First Amendment. *Doe* illustrates problems that may arise with college and university anti-discrimination codes and could serve as guidance to college officials especially in light of the Supreme Court ruling in *R.A.V.*

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[34] *Id.*

[35] *Id.* at ——, 112 S.Ct. at 2559.

[36] *Id.*

[37] *Id.*

[38] *Id.* at ——, 112 S.Ct. at 2560.

[39] *Id.* at ———, 112 S.Ct. at 2560–61.

[40] *Young v. American Mini Theatres,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).

[41] 505 U.S. at ——, 112 S.Ct. at 2567.

[42] *Id.*

The University of Michigan at Ann Arbor adopted a policy on discrimination and discriminatory harassment of students in the university environment in an attempt to curb what the University's Board of Regents viewed as a rising tide of racial intolerance and harassment on campus. The policy prohibited and sanctioned the "stigmatizing or victimizing" of individuals or groups on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era status.[44] The "victimizing" conduct included the distribution of a flyer declaring "open season" on blacks and the display of a Ku Klux Klan uniform from a dormitory window.[45] The university president issued a statement reaffirming the university's commitment to cultural diversity on campus following this incident. Still later legislative hearings were held in which speakers were openly critical, accusing the university of "generally ignoring" the problems of minority students.[46] Following a hearing with a campus anti-discrimination group, the group announced that it intended to file a class action lawsuit against the university "for not maintaining or creating a non-racist, nonviolent atmosphere" on campus.[47] After discussions with national civil rights leaders, the university adopted a policy and a six-point plan of action to remedy racial problems. None of the racial complaints were verified for their accuracy; nor were specific perpetrators identified.

In 1987, the university president resigned and a former university president was temporarily appointed until a successor was chosen. The acting president circulated a confidential memorandum detailing a proposal for an anti-discrimination disciplinary policy, recognizing that the policy might trigger First Amendment questions, but expressing a commitment to pursue the cause nonetheless. In 1988, the policy was adopted by the Board of Regents after twelve drafts were prepared and reviewed by the director of affirmative action, university counsel, law school faculty and following a public hearing. The policy which provided for progressive discipline based on the severity of the violation, applied to educational and academic centers, such as classrooms, libraries, research laboratories, recreation and study areas. The broadest range of speech was "tolerated" in "public parts" of the campus.[48] Only physical violence or acts of destruction were sanctionable in these public areas. However, the university's publications were exempt from this policy. In addition to penalizing behavior which stigmatizes or victimizes any individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, it barred express or implied threats to an individual's academic efforts, employment, extracurricular activities or personal safety, or conduct that has the reasonably foreseeable effect of harming another or creates a hostile environment or is unwanted sexual advances.[49] The university counsel was charged with responsibility for reviewing the constitutionality of these claims. Any member of the university community could file a complaint. Where a negotiated settlement was not possible, the procedure provided for formal complaint process with the accused student and complainant given the opportunity to give testimony and cross examine witnesses. Sanctions called for the use of progressive discipline, including an educational element in order to "sensitize the perpetrator."[50] Compulsory class attendance would not be imposed "in an attempt to change deeply held religious or moral convictions."[51] The sanctions began with a formal reprimand, and included restitution, removal from university housing, suspension and expulsion. A university guide issued in 1988 (but withdrawn in 1989 because of "inaccuracies") purported to give examples of prohibited discriminatory conduct (*e.g.*, "you tell jokes about gay men and lesbians.")[52]

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[43] *Doe v. University of Michigan*, 721 F.Supp. 852 [56 Ed.Law Rep. [821]] (E.D.Mich. 1989).

[44] *Id.* at 853.

[45] *Id.* at 854.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 856.

Doe was a psychology graduate student specializing in biopsychology, which he described as the interdisciplinary study of the "biological basis of individual differences in personality traits and mental abilities."[53] Doe said that certain controversial theories positing biologically-based differences between sexes and races might be perceived as sexist and racist by some students, and he feared that discussion of such theories might be sanctioned under the policy. He asserted that his right to freely and openly discuss these theories was "impermissibly chilled," and he requested that the policy be declared unconstitutional and enjoined on the grounds of vagueness and overbreadth.[54] The university argued that the policy was not intended to sanction classroom discussion of "legitimate ideas."[55] The U.S. District Court ruled that Doe had standing because there was a "realistic and credible" threat that he could be sanctioned were he to discuss certain biopsychological theories.[56]

With respect to Doe's vagueness and overbreadth argument, the U.S. District Court said that the university could not proscribe speech simply because it found it offensive or because it disagreed with the message.

> "These principles acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution's educational mission.... The state may not prohibit broad classes of speech some of which may indeed be legitimately regulable, if in so doing a substantial amount of constitutionally protected conduct is also prohibited. This is the fundamental infirmity of the policy.... Looking at the plain language of the policy, it was simply

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[49] *Id.*

[50] *Id.* at 857.

[51] *Id.*

[52] *Id.* at 858.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* at 859.

impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct.[57]

The court reached this decision despite the University's repeated arguments that the policy did not apply to protected First Amendment speech. The court found that the policy was consistently used to ban protective speech. For instance, a complaint was filed against a social work graduate student alleging that he harassed students on the basis of sexual orientation because he openly stated the belief that homosexuality was a disease and that he intended to counsel gay students to become straight. Ultimately, a hearing panel found the student guilty of sexual harassment but refused to convict him of harassment on the basis of sexual orientation.

With regard to the vagueness issue, the court ruled that the policy did not give adequate warning of protected conduct and set no explicit standards. Finally, the court reasoned that although ensuring equal educational opportunity is an important goal, it can not be done at the expense of free speech.

PART III: ANALYSIS OF RELATED FIRST AMENDMENT CASES AFFECTING COLLEGE AND UNIVERSITY HATE SPEECH POLICY

Perhaps the leading case on student free speech issues is *Tinker v. Des Moines Independent Community School District*[58] where two high school students and a junior high school student were suspended from school for wearing black arm bands to protest the government's policy in Vietnam, in contravention to the school's policy. The students sought nominal damages and injunctive relief. The United States District Court dismissed the complaint on the grounds that the regulation was within the school board's authority, despite the finding that the students' conduct was not disruptive to school activities. The U.S. Court of Appeals affirmed the District Court, and the U.S. Supreme Court, led by Justice Fortas, reversed. The Court said, in the often-quoted passage, that neither "students (nor) teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[59] This case sought to balance the State's and school's authority, consistent with constitutional safeguards, to proscribe and control student conduct, against the need for "scrupulous protection of constitutional freedoms," and the school's desire to nurture the exploration of expression. Although the *Tinker* facts pertain to the secondary school setting, the Court's opinion has relevance in light of *R.A.V.* for higher education hate speech policies. In *R.A.V.*, the Court made clear that it is unconstitutional to punish speech that simply arouses "anger or resentment". So too in *Tinker*, the Court said that speech which conveys an "unpopular viewpoint" cannot be silenced. Both *Tinker* and *R.A.V.* involve attempts to silence the expression of certain viewpoints (opposition to the Vietnam War/racial epithets) attempts which the Supreme Court ruled were unconstitutional. *R.A.V.* further enhances *Tinker* to the extent that the attempt to chill expression is unconstitutional.

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[57] *Id.* at 863.

[58] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

[59] *Id.* at 506, 89 S.Ct. at 736.

In a 1973 *per curiam* decision of the Supreme Court in *Papish v. the Board of Curators of the University of Missouri,*[60] the Court ruled the expulsion of a 32 year old graduate student from the University of Missouri School of Journalism for distributing on campus a newspaper containing "indecent speech" in violation of the Board of Curators' bylaws abridged the student's First Amendment rights. The newspaper article in question had two objectionable passages. Firstly, on the front cover the publishers, who had received authorization from the University's business office to publish the newspaper for the preceding four years, reproduced a political cartoon previously depicted in another newspaper showing policemen raping the Statue of Liberty and the Goddess of Justice. The caption under the cartoon read ". . . with liberty and justice for all." Secondly, the article was entitled, "Mother-Fucker Acquitted," discussing the trial and acquittal of an assault charge of a New York city youth who was a member of an organization known as "Up Against The Wall, Mother-Fucker."[61] The U.S. District Court and the U.S. Court of Appeals found no constitutional violation of the student's rights. The Supreme Court, citing *Healy v. James*[62] decided only several days earlier, concerning a State university's authority to enforce reasonable student conduct rules, reaffirmed that "state colleges and universities are not enclaves immune from the sweep of the First Amendment."[63] *Healy* and *Papish* clarified that "mere dissemination of ideas—no matter how offensive to good taste—on a State university campus may not be shut off in the name alone of 'conventions of decency'."[64] The Court said the expression was not obscene and therefore protected. Finally, the Court concluded that the "First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech."[65] *Papish* is reaffirmed and made stronger by *R.A.V.* to the extent that both cases prohibit the government from silencing expressive conduct or speech on the basis of viewpoint, even if the viewpoint is "reprehensible or 'offensive to good taste'."

In the 1988 case, *Hazelwood School District v. Kuhlmeier,*[66] the Supreme Court, led by Justice White, ruled that high school officials were justified in withholding publication of two pages of a curriculum-based newspaper article which discussed teenage pregnancy and divorce because it contained references to sexual activity and birth control which officials believed was "inappropriate for some younger students."[67] The divorce article, officials maintained, did not give students' parents a fair opportunity to reply to allegations. The Court held "educators are entitled to exercise greater control over [school sponsored publications, theatrical productions, and expressive activities] to assure that participants learn whatever lessons the activity is designed to teach . . . ."[68]

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[60] *Papish v. Board of Curators of the University of Missouri,* 410 U.S. 667, 93 S.Ct. 1197, 35 L.Ed.2d 618 (1973).

[61] *Id.* at 667–68, 93 S.Ct. at 1198.

[62] *Healy v. James,* 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972).

[63] 410 U.S. at 670, 93 S.Ct. at 1199.

[64] *Id.*

[65] *Id.* at 671, 93 S.Ct. at 1200.

[66] *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 [43 Ed.Law Rep. [515]] (1988).

[67] *Id.* at 263, 108 S.Ct. at 566.

Hazelwood can be distinguished from *R.A.V.*, *Tinker, Doe* and *Papish* in that the publication was a curriculum-based project, subject to the school's approval. *Hazelwood* was decided on the integral relationship between the speech and the school's authority. The Court made clear that the school is charged with responsibility for providing values to young, impressionable minds and therefore has the right to control curricular-based information provided to them. *Hazelwood* has less relevance to higher education because of the traditional role colleges and universities play in providing an atmosphere for the free exchange of ideas among adults.

The issue of whether the State may impose enhanced penalties for criminal action if the State proves that the actor intentionally selected the victim because of the victim's race, religion, color, disability, sexual orientation, national origin or ancestry was addressed by the Wisconsin Supreme Court in *Wisconsin v. Mitchell*[69]. An appeal to the Supreme Court has been granted. In this decision the Wisconsin Supreme Court ruled that the State's 'hate crimes' statute violated the First Amendment because it punishes offensive thought. The statute punishes personal prejudices and impermissibly infringes on individual First Amendment rights. The Court said, the "First Amendment protects all speech and thought, regardless of how offensive it may be."[70] This case will give the U.S. Supreme Court a further opportunity to clarify *R.A.V.*

PART IV: CONCLUSIONS

R.A.V. ratified *Doe* to the extent that the justices struck down a university policy that curtailed free speech. There are similarities in these two decisions. Both the University of Michigan policy and the St. Paul ordinance attempt to curtail and control acts of racial intolerance. However, in so doing both penalize otherwise constitutionally protected activity. Both courts agree that the City of St. Paul in *R.A.V.* and the University of Michigan in *Doe* have the authority and perhaps moral obligation to end racial violence and intolerance. The weapon used to achieve this goal, under the *R.A.V.* Court, must be "necessary to serve the asserted (compelling) interest." The *Doe* court felt that efforts to "combat discrimination" should have been within the First Amendment without imposing a chilling effect on free speech. Given the similarities in these cases, it is likely that the U.S. Supreme Court if asked to decide *Doe* would have ruled that the University of Michigan's anti-discrimination/harassment policy is unconstitutional. Thus, the District Court's holding which struck down the policy is still good law today.

In light of these two cases, colleges and universities nationwide must reexamine their campus hate speech policies. Hate speech seeks to silence the minority, to intimidate and to oppress. Its roots and manifestations are derived from racial hatred and intolerance. It is ironic that the First Amendment, which exists to promote the unfettered expression by all, is used to protect speech which is designed to repress and terrorize minorities. The dilemma for colleges and universities is to balance free speech rights and the rights and freedoms of victims of hate speech. By tolerating hate speech, colleges and universities may be placed in the awkward position of tacitly condoning such behavior. In response, some colleges and universities are considering new codes that simply do not tolerate violence and intimidation directed at anyone.[71] Codes built on one-on-one infractions are considered more likely to survive legal challenge if they closely follow state and federal anti-discrimination laws.[72]

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[68] *Id.* at 271, 108 S.Ct. at 570.

[69] *State of Wisconsin v. Mitchell*, 169 Wis.2d 153, 485 N.W.2d 807 (1992) cert. denied, — U.S. ——, 113 S.Ct. 810, —— L.Ed.2d ——.

[70] *Id.*

As a society, we expect the broadest exchange of ideas in colleges and universities. Colleges and universities cannot ban speech which is not "politically correct" without implicating the First Amendment. *R.A.V.* makes clear that overbroad restrictions and content-based discrimination will fail. Colleges and universities must carefully examine codes to eliminate discrimination yet encourage wide dissemination and exchange of expression.

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[71] Supra note 3. *See also,* Thomas S. Johnson, *Confronting Campus Hate Speech: The First and Fourteenth Amendments Collide,* 79 Illinois Bar Journal Dec. 1991 at 644; James Weinstein, *A Constitutional Roadmap to the Regulation of Campus Hate Speech,* Wayne Law Review Fall 1992 at 163-247.

[72] *Id.*

Students' Right to Counsel in University Disciplinary Proceedings

Douglas R. Richmond*

INTRODUCTION

In recent years, courts have afforded college[1] students at public institutions a number of constitutional rights previously ignored on campuses. The first amendment protects students' rights to freedom of speech, freedom of association, and the free exercise of religion.[2] The fourth amendment has been held to protect students from unreasonable searches and seizures in university housing.[3] Students are also entitled to due process as provided by the fourteenth amendment when facing disciplinary sanctions.[4] One constitutional safeguard which courts reluctantly extend to college students is the right to counsel under the Due Process Clause of the fourteenth amendment.[5]

Students usually seek the assistance[6] of counsel when facing severe disciplinary sanctions, such as suspension or expulsion. Considering

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[1] "College" and "university" are used interchangeably throughout this article.

[2] See Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 506, 89 S. Ct. 733, 736 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); Healy v. James, 408 U.S. 169, 92 S. Ct. 2338 (1972) (the first amendment protects students' rights to freedom of association); Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269 (1981) (students' rights to engage in religious worship and discussion are forms of speech and association protected under the first amendment).

[3] See Piazzolo v. Watkins, 442 F.2d 284 (5th Cir. 1971).

[4] See Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930, 82 S. Ct. 366 (1961); Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729 (1975).

[5] The sixth amendment provides that "[i]n all criminal prosecutions, the accused . . . shall have the assistance of counsel for his defense." U.S. CONST. amend. VI. Because university disciplinary proceedings are not criminal prosecutions, sixth amendment protections are inapplicable. If and when students are entitled to the assistance of counsel in disciplinary proceedings, that right must attach under the Due Process Clause of the fourteenth amendment.

[6] Assistance of counsel as it is used in this article refers to attorneys' advice, assistance in the preparation of a defense, and accompaniment of students when they act for themselves in disciplinary proceedings. This is distinct from attorneys' representation of students, which refers to attorneys' actual participation in proceedings (*i.e.*, through the direct or cross-examination of witnesses), and so on. Courts allow the *assistance* of counsel in certain circumstances, but generally prohibit *representation*. See *infra* notes 69-107 and accompanying text.

282

the potentially damaging consequences in such situations, it seems odd that courts are generally unwilling to allow students to be assisted by attorneys. University administrators, charged with enforcing student-conduct rules, favorably view courts' reluctance to allow attorneys to assist students in campus hearings. Administrators want to keep attorneys out of hearings for two primary reasons: First, college discipline is seen as serving educational and counseling purposes, which attorneys are considered incapable of enhancing.[7] Second, administrators are concerned that attorneys would employ technical legal maneuvers or "chicanery," which would escalate hearings into adversarial proceedings.[8]

Nonetheless, students have been granted the right to counsel in disciplinary proceedings under some circumstances. It is important that university administrators recognize these circumstances, so that students' rights may be protected.

II. BACKGROUND

Inquiries into students' right to counsel in university disciplinary proceedings must begin with an understanding of the theoretical foundations for university regulation of student conduct. This background provides a perspective from which students' rights may be considered.

A. *In Loco Parentis*

For many years colleges were the guardians of their students' health, welfare, and morals, and closely regulated their students' lives. Students were expelled from colleges for such petty violations as smoking.[9] Schools derived this broad authority to regulate student conduct from the common law doctrine of "in loco parentis," meaning that schools stood, literally, "in the place of a parent."[10] The clearest judicial pronouncement of the in loco parentis doctrine appears in *Gott v. Berea College*.[11] In upholding the College's authority to prevent its students from frequenting local restaurants and taverns, the court stated:

> College authorities stand in loco parentis concerning the physical and moral welfare and mental training of their pupils, and we are unable to see why . . . they may not make any rule or regulation for the government or betterment of their pupils that a parent could make for the same purpose.[12]

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[7] *See* Weisinger & Crafts, *Right to Counsel: Legal and Educational Considerations*, 17(2) NASPA JOURNAL 27, 30 (1979).

[8] *Id.* at 30.

[9] McClintock v. Lake Forest Univ., 22 Ill. App. 468 (1921).

[10] BLACK'S LAW DICTIONARY 403 (abr. 5th ed. 1983).

[11] 161 S.W. 204 (Ky. 1913).

[12] 161 S.W. at 206.

Burdensome as this relationship might seem, it was expected by parents, acquiesced to by students, and accepted by colleges.

Use of the in loco parentis doctrine as a basis for describing the student-university relationship has essentially disappeared. The principal reason for this is the practical difficulty of conceiving of colleges and universities as substitute parents when most of their students have reached the age of majority, or are otherwise beyond parental control.[13] The demise of the doctrine began in the late 1960's when, in the wake of student protests against racial inequality and the Vietnam War, a new student independence emerged.[14]

Recently, several authors have suggested that in loco parentis has reemerged.[15] The doctrine's return is supposedly evidenced by (1) students' demands as consumers for college placement, financial aid, and counseling services;[16] and (2) students' suits against institutions when harmed as a result of criminal attacks on campus, the negligent acts of others, or even their own acts.[17] However, student consumerism (and the associated demands for better institutional services) has long been recognized as a separate trend and has little to do with students' desires for universities to resume control of their lives. Furthermore, students' suits against universities for physical harm suffered have, with a few exceptions,[18] been unsuccessful.[19] Courts have expressly rejected in loco parentis as a basis for liability, making clear students' status as independent adults.[20] It is equally likely that students sue institutions not because they think colleges the paternal guardians of their safety, but because they think colleges have "deep pockets." In fact, there seems to be no evidence that in loco parentis has returned.

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[13] Lerblance, *Legal and Educational Aspects of Student Dismissal: A View From the Law School*, 33 S.W.L.J. 605, 607 (1979).

[14] See Szablewicz & Gibbs, *Colleges' Increasing Exposure to Liability: The New In Loco Parentis*, 15 J.L. & EDUC. 453 (1987).

[15] See, e.g., Gibbs & Szablewicz, *Colleges' New Liabilities: An Emerging New In Loco Parentis*, 29(2) J.C. STUDENT DEVELOPMENT 100 (1988); Gregory & Ballou, *In Loco Parentis Reinventis: Is There Still a Parenting Function in Higher Education?*, 24(2) NASPA J. 28 (1986); Szablewicz & Gibbs, *supra* note 14; Zirkel & Reichner, *Is the In Loco Parentis Doctrine Dead?*, 15 J.L. & EDUC. 271 (1986).

[16] See Gregory & Ballou, *supra* note 15, at 30-31; Szablewicz & Gibbs, *supra* note 14, at 453.

[17] See Szablewicz & Gibbs, *supra* note 14, at 453.

[18] See, e.g., Mullins v. Pine Manor College, 449 N.E.2d 331 (Mass. 1983) (college liable for on-campus sexual assault of student).

[19] See, e.g., Relyea v. State, 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980) (college not liable for on-campus assault on student); Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979) (college not liable when student injured in traffic accident following class party), cert. denied, 446 U.S. 909, 100 S. Ct. 1836 (1980); Beach v. University of Utah, 726 P.2d 413, (Utah 1986) (university not liable when student injured in fall on field trip); Whitlock v. University of Denver, 712 P.2d 1072 (Colo. Ct. App. 1985), *rev'd*, 744 P.2d 54 (Colo. 1987) (university not liable when student injured in trampoline accident at fraternity house); Furek v. University of Del., 535 A.2d 408 (Del. 1987) (university not liable when student injured in hazing incident at fraternity house).

[20] See Case Comment, *Eiseman v. State of New York: The Duty of a College to Protect Its Students From Harm by Other Students Admitted Under Special Programs*, 14 J.C.U.L. 591, 593 nn.13, 14 (1988), and accompanying text.

B. *Fiduciary Theory*

A second basis for university regulation of student conduct has been proposed in terms of a fiduciary relationship between institutions and their students. According to this theory, universities establish environments conducive to their students' mental development and general benefit.[21] In return, students subject themselves to examinations, often disclose confidential health, background, and financial information, and are asked to place their trust in personal and career counselors.[22] This confidence which, out of necessity, students must show in institutions, is thought to equal that placed in a fiduciary. In fact, it has been compared to the confidence one would place in a clergyman, doctor, lawyer, or corporate director.[23] This relationship allows universities to make decisions, disciplinary or otherwise, that are believed to be in students' best interests.

Despite the apparent applicability of the fiduciary theory, courts have seldom applied it. There is no explanation for this deficiency, but speculation has centered on (1) lawyers' failure to pursue this approach in analyzing their cases, and (2) courts' reluctance during the development of education law in the early 1900's to tamper with private relationships outwardly contractual.[24] Nevertheless, courts' deference to decisions made by university administrators in academic competence cases is sometimes attributed to the existence of fiduciary relationships.[25]

C. *Contract Theory*

The most widely-accepted description of the student-university relationship follows contract theory. Courts in the United States characterized the relationship between colleges and students as contractual as early as 1891.[26] The contract theory assumes that students and universities are parties to a contract, each conferring some benefits and accepting some burdens. Universities, by recruiting students, make offers which students accept by enrolling. Students agree to pay tuition and other costs, and universities agree to provide instruction and, ultimately, degrees, conditioned upon students' satisfactory academic performance and compliance with institutional policies.

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[21] See Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 Ky. L.J. 643, 671-72 (1966).

[22] *Id.*

[23] *Id.* at 672.

[24] See *id.*, at 673; *see generally* Fowler, *The Legal Relationship Between the American College Student and the College: An Historical Perspective and the Renewal of a Proposal*, 13 J.L. & Educ. 401, 414-16 (1984).

[25] See R. Hendrickson & A. Gibbs, The College, The Constitution and The Consumer Student 3 (1986).

[26] See Jennings, *Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed?*, 7 J.C.U.L. 191 (1980-81).

Most contract cases involving students and universities have been decided for the purpose of determining universities' power to enforce their "contracts" with students by expelling students.[27] More recently, educational contract cases have strayed from disciplinary matters, and have included disputes over universities' duties to provide promised curricula, atmospheres conducive to learning, and educational progress free from invidious discrimination.[28]

The educational contract is more implied than express. The contract between a student and a university is obviously not embodied in a document negotiated by the parties. The contract's terms are usually spread throughout a number of documents, including registration forms, catalogs, student handbooks, and other institutional publications.[29] Oral assertions might also be among the terms.[30] The general nature of the student-university contractual relationship may also be found in the reasonable expectations of the parties arising from the contract terms.[31]

The application of contract theory to the student-university relationship may be unfair to students. The written materials that generally constitute the contract, ranging from handbooks to catalogs, are not drafted to be contracts. It is doubtful that students perceive these materials to be contracts.[32] Furthermore, because catalogs, handbooks, and other materials cannot be written to provide for all contingencies, courts often interpret generally-worded sections to allow universities' actions.[33]

Despite criticism of the contractual theory, most courts cite contract doctrine as the controlling relation between students and universities, especially when the universities are private.[34] Although reliance on contract theory has traditionally favored universities and limited students' rights,[35] such results are not guaranteed. Indeed, courts have construed contracts in favor of students in disciplinary cases.[36] Contract theory may protect students who are sanctioned by universities in violation of the universities' own procedures. It might also be argued that the contractual principle of reasonableness requires courts to find that the "contract" contains implied terms which requires universities to act in a fair and reasonable manner when they conduct disciplinary proceedings.[37] Thus, students may be protected from arbitrary disciplinary action by virtue of contractual relationships with the colleges they attend.

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[27] See Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J.C.U.L. 141, 152 (1981-82).

[28] *Id.* at 156.

[29] Goldman, *supra* note 21, at 651.

[30] Nordin, *supra* note 27, at 156.

[31] *Id.* at 158.

[32] See Dodd, *The Non-Contractual Nature of the Student-University Contractual Relationship*, 33 KAN. L. REV. 701, 714 (1985).

[33] *Id.* at 715.

[34] See, e.g., Zumbrun v. University of S. Cal., 101 Cal. Rptr. 499, 504 (1972) ("The basic legal relation between a student and a private university or college is contractual.").

[35] Lerblance, *supra* note 13, at 608.

[36] See, e.g., Andersen v. Regents of the Univ. of Cal., 99 Cal. Rptr. 531 (1972).

III. DUE PROCESS CONSTRAINTS ON THE DISCIPLINARY PROCESS

All examinations of students' rights to due process, including the right to counsel, first require a determination of whether the students' interests fall "within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."[38] Property interests may be created when there is legitimate reliance on a benefit.[39] College students in good academic standing legitimately expect to receive their degrees upon completion of their course requirements. As a result, students possess property interests in their educations.[40] Students' liberty interests are usually infringed by the stigma that accompanies suspension or expulsion.[41] Thus, at least at public institutions, students facing significant disciplinary penalties are entitled to due process protections.[42]

A. *The Development of Due Process on Campus*

Until the early 1960's, federal courts declined to consider whether student dismissals might violate due process. Judicial review was denied on the ground that federal courts lacked jurisdiction,[43] or, if they had jurisdiction, that a college education was a privilege and not a right.[44]

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[37] Lerblance, *supra* note 13, at 609.

[38] Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600 (1972). The fourteenth amendment provides, in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[39] *See* Note, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132, 2136 (1987) (*citing Board of Regents v. Roth*, 408 U.S. 564, 576-77, 92 S. Ct. 2701, 2708-09 (1972)).

[40] *Id.* at 2137.

[41] In Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S. Ct. 507, 510 (1971), the Supreme Court explained that liberty interests protected by due process exist "[w]here a person's good name, reputation, honor or integrity [are] at stake because of what the government is doing to him." This approach was scaled back in Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155 (1976), in which the Court held that not all defamations infringe liberty interests. Instead, stigma must accompany the deprivation of a right previously held under state law, or otherwise alter some legal status, such as employment. *Id.* at 708-09, 91 S. Ct. at 1164.

The significant alteration of suspended or expelled students' status is most evident in their inability to enroll at other universities. Subsequent universities to which students may apply are always aware of prior dismissals. *See* Note, *supra* note 39, at 2138. Consequently, dismissal from one university can mean the end of a student's education. *Id.* at 2138-39. Such results inflict both economic and emotional harm.

[42] For a discussion of the differences between public and private institutions, and the due process implications, see *infra* notes 129-55, and accompanying text.

This hands-off approach came to a halt in 1961 in the landmark case of *Dixon v. Alabama State Board of Education*.[45] In *Dixon*, the Fifth Circuit Court of Appeals ruled that the expulsion of six students from a state college for unspecified acts of misconduct, without notice of the charges against them, or an opportunity for a hearing, violated the due process clause of the fourteenth amendment. Even if the students' attendance at a state college were a privilege and not a right, the court observed, "it nonetheless remains true that the State cannot condition the granting of even a privilege upon the renunciation of the Constitutional right to procedural due process."[46] The court ruled that before a state school could expel students for disciplinary reasons, students were entitled to notice and a hearing.[47] *Dixon* did not mandate that college disciplinary proceedings mirror criminal trials. The court stated that "full-dress judicial hearings" were not necessary,[48] and that hearing procedures "should vary depending upon the circumstances of the particular case,"[49] so long as the "rudiments of an adversary proceeding" are preserved.[50]

Dixon established the foundation for students' rights to due process in university disciplinary proceedings. The *Dixon* court's discussion of what might constitute sufficient notice and an adequate hearing was relied upon in later cases to determine the propriety of universities' disciplinary proceedings.[51] Six years after *Dixon* was decided, a federal district court in *Esteban v. Central Missouri State College*,[52] more specifically defined the general due process requirements established in *Dixon*.

In *Esteban*, the College suspended the plaintiffs for their roles in student demonstrations. The court held that the students were not afforded procedural due process, and ordered the College to provide them with the following protections: (1) a written statement of the charges, for each student, made available at least ten days before the hearing; (2) a hearing before the person(s) having the power to suspend or expel; (3) the opportunity for advance inspection of any affidavits or exhibits that the College intended to produce at the hearing; (4) the right to have counsel present at the hearing to advise them (but not to cross-examine witnesses); (5) the opportunity to present their own version of the facts, including affidavits, exhibits, and witnesses; (6) the right to hear the evidence against them and personally (*i.e.*, not through counsel) question adverse witnesses; (7) a determination of the facts of each case based solely on the evidence presented at the hearing; (8) a written statement of the hearing officer's findings of fact; and (9) the right to make a record of the hearing at their own expense.[53] The Eighth Circuit Court of Appeals subsequently affirmed the decision.[54]

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[43] Lerblance, *supra* note 13, at 609.

[44] *Id.* at 609-10 (citing Hamilton v. Regents of the Univ. of Cal., 99 Cal. Rptr. 531 (1972)).

[45] 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930, 82 S. Ct. 368 (1961).

[46] *Id.* at 156.

[47] *Id.* at 158-59.

[48] *Id.* at 159.

[49] *Id.* at 158.

[50] *Id.* at 159.

[51] See Due v. Florida A. & M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963).

[52] 277 F. Supp. 649 (W.D. Mo. 1967).

Most courts continue to focus on the flexible notice and hearing concept of *Dixon*,[55] and avoid the detail of *Esteban* when determining college students' due process rights. Nevertheless, the *Esteban* requirements illustrate the outer limits of what a court might consider.[56] At least one other court has reached those outer limits. In *Marin v. University of Puerto Rico*,[57] the federal district court ruled that the "minimum protection constitutionally required"[58] in disciplinary proceedings involving suspension included the right to counsel.[59] The court further mandated that accused students be allowed to cross-examine opposing witnesses with the assistance of counsel.[60] One recent article has suggested that *Marin* be adopted as the new standard to gauge whether college students have received due process in disciplinary proceedings.[61] However, the article failed to recognize that *Marin* has been disregarded even in the First Circuit,[62] of which the District of Puerto Rico is a part.[63] More properly, *Marin* should be viewed as

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[53] *Id.* at 651-52; W. KAPLIN, THE LAW OF HIGHER EDUCATION 304 (2d ed. 1986).

[54] 415 F.2d 1077 (8th Cir. 1969).

[55] W. KAPLIN, *supra* note 53, at 304.

[56] *Id.*

[57] 377 F. Supp. 613 (D.P.R. 1974).

[58] *Id.* at 624.

[59] *Id.* at 623-24.

[60] *Id.* at 623.

[61] *See* Blaskey, *University Students' Right to Retain Counsel for Disciplinary Proceedings*, 24 CAL. W.L. REV. 65, 67-68 (1988).

[62] Most recently, in Gorman v. University of R.I. 646 F. Supp. 799 (D.R.I. 1986), *modified*, 837 F.2d 7 (1st Cir. 1988), a student was denied the assistance of counsel in a university disciplinary proceeding because there were no criminal charges stemming from the incident in question. 646 F. Supp. at 806, 837 F.2d at 16. In so holding, neither the district court nor the First Circuit Court of Appeals even cited *Marin* in their discussions of students' right to counsel. *Id.* The holding in *Gorman* is no surprise; for several years the rule in the First Circuit has been that students have a right to counsel only when facing criminal charges arising out of the same set of facts as the disciplinary proceedings. See Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978); McLaughlin v. Massachusetts Maritime Academy, 564 F. Supp. 809 (D. Mass. 1983). For a discussion of *Gabrilowitz*, *McLaughlin*, and students' right to counsel when facing both criminal and disciplinary charges, see *infra* notes 83-107 and accompanying text.

[63] It is difficult to determine how Blaskey would fit *Marin* into the general framework surrounding students' due process rights, including students' right to the assistance of counsel because Blaskey omits a discussion of several significant cases involving or

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an extreme case, with the *Dixon* requirements remaining the logical focus.

B. *Is Today's Due Process Fair Process?*

Today's version of disciplinary due process, that is, notice to students of the charges against them and an opportunity to be heard, is sometimes criticized as unfair to students.[64] Most criticism centers on courts' presumption that student affairs administrators are impartial when making disciplinary decisions.[65] As one author stated, "Any administrator who initially decides a student should be charged naturally has a predisposition to find him guilty of that charge."[66] In many cases involving significant disciplinary matters, such as suspension or expulsion, however, the administrator initiating the action is not the sole decisionmaker; rather, some type of committee or judicial board bears ultimate responsibility.[67] Even when the charging administrator has the power to suspend or expel, there is usually some appeals process by which the charging administrator's judgment may be checked.[68]

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establishing circumstances in which students are entitled to the assistance of counsel. Among these cases are French v. Bashful, 303 F. Supp. 1333 (E.D. La. 1969), *appeal dismissed*, 425 F.2d 182 (5th Cir. 1970), *cert. denied*, 400 U.S. 941, 91 S. Ct. 232 (1970); Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978); McLaughlin v. Massachusetts Maritime Academy, 564 F. Supp. 809 (D. Mass. 1983); Henson v. Honor Comm. of Univ. of Va., 719 F.2d 69 (4th Cir. 1983); University of Houston v. Sabeti, 676 S.W.2d 685 (Tex. Ct. App. 1984); and Gorman v. University of R.I., 646 F. Supp. 799 (D.R.I. 1986), *modified*, 837 F.2d 7 (1st Cir. 1988). See Blaskey, *supra* note 61, at 75-82.

Blaskey further mischaracterizes the university disciplinary process. He suggests that university disciplinary hearings are the equivalent of criminal trials or hearings because formal charges are brought, witnesses testify, and cross-examinations may be conducted. See Blaskey, *supra* note 61, at 82. This superficial analogy is directly contrary to the manner in which courts and most commentators view the disciplinary process. It ignores institutions' strong interests in the promulgation of disciplinary rules and procedures, and the educational nature of many disciplinary proceedings.

[64] *See* Note, *supra* note 39. Interestingly, James M. Picozzi, the author of the Note, was a defendant in a disciplinary case while a law student at the University of Michigan. See Picozzi v. Sandalow, 623 F. Supp. 1571 (E.D. Mich. 1986). Picozzi's article reflects a bias against the current interpretation of educational due process and, indeed, he admits his bias in a footnote.

[65] "[C]ourts presume good faith on the part of school administrators—but why they do so is unclear." Note, *supra* note 39, at 2140.

[66] *Id.* at 2142.

[67] *See* Golden, *Procedural Due Process for Students at Public Colleges and Universities*, 11 J.L. & EDUC. 337, 359 (1982) ("Hearing panels appear to be more widely used than hearing officers in general.").

Admittedly, in many situations the student affairs administrator initiating disciplinary action also decides the student's punishment. However, these cases usually involve the imposition of relatively minor disciplinary sanctions, such as probation, or the mere delivery of "Dutch Uncle talks." Such encounters are valuable teaching and counseling opportunities, no one can reasonably suggest that individual administrators should be denied this discretion.

[68] *Id.*

IV. The Right to Counsel

The assistance of counsel was not cited in *Dixon* as a requirement of due process. Some courts have relied on that omission to support the position that the right to counsel is not a required safeguard in university disciplinary proceedings.[69] Courts have declined to recognize a right to counsel for a variety of other reasons. These include the beliefs that disciplinary proceedings are not judicial in nature and should be kept informal, that literate and educated students should be able to defend themselves, and that courts should not interfere with colleges' rights to determine their own disciplinary procedures.[70]

The Supreme Court has not been called upon to decide whether students have a right to counsel in university disciplinary proceedings. The Court came closest to addressing the issue in *Goss v. Lopez*.[71] In *Goss*, students at a public high school were arbitrarily suspended for ten days for their roles in a lunchroom disturbance. The Court ruled that the students were entitled to "fundamentally fair" disciplinary procedures, including notice and a hearing.[72] The failure by the school to provide these violated the students' right to due process. *Dixon* had set out essentially the same requirements fourteen years earlier. On the issue of students' right to counsel, the Court stated, "[W]e stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the students the opportunity to secure counsel. . . ."[73] The Supreme Court never reached the issue of whether the assistance of counsel might be required when students face lengthy suspensions or expulsion. Instead it limited its ruling to short suspensions of ten days or less.[74]

Goss resulted in a recognized lack of binding precedent regarding students' right to counsel. Such right to counsel is thus determined in other courts, both state and federal. As might be expected, the courts' decisions have varied. From this gray area two situations have emerged in which courts allow students to be assisted by attorneys. First, students are entitled to the assistance of counsel when the university proceeds through counsel. Second, students may be assisted by counsel when they face criminal charges arising out of the same set of facts that led to the university disciplinary charges.

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[69] *See, e.g.*, Barker v. Hardway, 283 F. Supp. 228 (S.D. W.Va. 1968), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905, 89 S. Ct. 1009 (1969); Haynes v. Dallas County Junior College Dist., 386 F. Supp. 208 (N.D. Tex. 1974).

[70] *See* Comment, *Constitutional Law—Procedural Due Process—Student Has Right to Have Attorney Present at University Disciplinary Hearing When Criminal Charges Are Pending*, 1978 B.Y.U. L. Rev. 722, 725; *see also* Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1252 (E.D. Mich. 1984), *aff'd*, 787 F.2d 590 (no right to counsel where disciplinary proceedings not complex, and student had opportunity to discuss case with administrator prior to hearing).

[71] 419 U.S. 565, 95 S. Ct. 729 (1975).

[72] *Id.* at 568, 95 S. Ct. at 732.

[73] *Id.* at 568, 95 S. Ct. at 740.

[74] *Id.*, 95 S. Ct. at 741.

A. *When the Institution Proceeds Through Counsel*

If an institution employs counsel in disciplinary proceedings, the students charged are entitled to the assistance of counsel. This proposition is based primarily on *French v. Bashful.*[75]

In *French*, the plaintiffs, students at Southern University in New Orleans, were suspended or expelled by the University's disciplinary committee because of their roles in campus demonstrations. The committee denied the plaintiffs' request to be assisted by counsel at their hearing. Although the court believed that the students received a fair hearing,[76] and were afforded the protections mandated by *Dixon*,[77] it nonetheless held that the students were denied due process when they were not allowed to have their attorneys assist them at the hearing.

The reason for the court's decision was Southern's use of a third-year law student to prosecute the cases. Although the law student was not a lawyer at the time of the proceedings, the court believed that his ability to conduct himself appropriately in such surroundings was far superior to that of the students.[78] In fact, a member of the disciplinary committee testified that the law student "was chosen to prosecute these cases because of his familiarity with legal proceedings."[79] Thus, the plaintiffs had lost an extremely valuable right—a college education—when placed at a disadvantage that could be overcome by the assistance of counsel. The court ordered the University to hold new hearings for the students, at which time they would have the right to be assisted by their retained counsel.[80]

Although *French* was not the first case to address students' right to counsel when a university proceeds through counsel,[81] few, if any, similar cases have arisen subsequently. This is probably attributable to the fact that few colleges or universities use attorneys or law students to prosecute student disciplinary cases. Courts have yet to consider cases in which a university's use of counsel is more subtle, such as those in which an attorney instructs an administrator on presenting a case against a student.[82]

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[75] 303 F. Supp. 1333 (E.D. La. 1969), *appeal dismissed*, 425 F.2d 182 (5th Cir.), *cert. denied*, 400 U.S. 941, 91 S. Ct. 232 (1970).

[76] "[W]e are of the opinion that for the most part the hearings were conducted in a fair and impartial manner." 303 F. Supp. at 1336.

[77] "The students were given advance notice of the hearings and of the charges against them. They were permitted to call their own witnesses and to cross-examine the witnesses who testified against them—a procedural right which the [c]ourt in *Dixon* said does not have to be afforded to them." *Id.*

[78] *Id.* at 1338.

[79] *Id.* at 1337.

[80] *Id.* at 1339. There may be some question as to what extent the court anticipated the students' attorneys being able to assist them. The court used the term "representation," implying that the students' attorneys would be able to actually participate in the hearing. At the same time, the court implied that the University could restrict counsel's role by prohibiting cross-examination by counsel. *See id.* at 1337. This ambiguity was never clarified.

[81] See Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967) ("Where the proceeding is non-criminal . . . and the government does not proceed through counsel . . . due process does not require representation by counsel.").

B. *When Criminal Charges are Pending*

Special concerns arise when students face disciplinary action for incidents which are also violations of the law. In these cases, students' statements may lead to criminal convictions as well as institutional penalties, since students risk incriminating themselves in university disciplinary hearings. The magnitude of the risk depends on the timing of the university hearings.[83] When students have been criminally tried and verdicts have been returned prior to university hearings, the risks are minimal. If students are criminally tried and are acquitted, the double jeopardy doctrine will generally shield them from a second criminal prosecution based on incriminating disciplinary hearings.[84] If students are convicted, erroneous or incriminating findings of fact in disciplinary hearings are irrelevant.[85]

On the other hand, when students have been criminally charged, but not tried or when students have yet to be charged prior to the university disciplinary hearings, the risks are enormous. Under such circumstances, students face difficult choices. Students who actively defend themselves in disciplinary hearings may incriminate themselves and expose the strengths and weaknesses of their cases to attentive criminal prosecutors.[86] When criminal charges have yet to be filed, students' performances at hearings may determine whether they will be charged.[87] The students' only other choice, a meager one, may be to avoid contesting the disciplinary charges, thereby aiding their criminal defense, but simultaneously ensuring their suspension or expulsion.[88]

In *Gabrilowitz v. Newman*,[89] the First Circuit Court of Appeals addressed whether a student has a right to counsel in disciplinary proceedings when a criminal trial is pending. The student, Steven A. Gabrilowitz, a senior at the University of Rhode Island (U.R.I.), was charged with assault with intent to commit rape on another student.

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[82] *See* Frey, *The Right of Counsel in Student Disciplinary Hearings*, 5 VAL. U.L. REV. 48, 54, 55-59 (1970). Although Professor Frey made this observation almost two decades ago, it remains true today.

[83] *See* Note, *supra* note 39, at 2152.

[84] *See, e.g.*, United States v. Scott, 437 U.S. 82, 91, 98 S. Ct. 2187, 2194 (1978) ("A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution . . . .").

[85] *See* Note, *supra* note 39, at 2152.

[86] *Id.* at 2153.

[87] *Id.*

[88] Less than one fourth of the public institutions responding to a national survey indicated that they allow students to remain silent in disciplinary proceedings without negative inferences being drawn. *See* Golden, *supra* note 67, at 345-59.

[89] 582 F.2d 100 (1st Cir. 1978).

While Gabrilowitz was at the police station being charged, he was suspended by the University. He was subsequently directed to appear before U.R.I.'s student conduct board and defend himself against specific allegations of assault with intent to commit rape. The student conduct board's rules of procedure prohibited the presence of legal counsel at hearings. Gabrilowitz sought an injunction, asking that he be allowed the assistance of counsel; the district court issued the injunction. The First Circuit Court of Appeals affirmed the district court's decision.

In considering the case, the court acknowledged that most courts did not recognize a right to counsel in university disciplinary hearings, but noted that those cases did not involve "the specter of a criminal case hovering over the hearing."[90] The court found that Gabrilowitz would be deprived of due process if, without the assistance of counsel, he were forced to choose between the risk of expulsion and the risk of self-incrimination at the hearing.[91] The court conceded that the presence of counsel would not remove all the risks, but would enable Gabrilowitz to make an intelligent and informed choice between the risks presented.[92] Of critical note, the court restricted the role of counsel to advising the student, and excluded counsel from actual participation in the hearing.[93]

Just two years later, in *Boyle v. Newman*,[94] the University of Rhode Island returned to court, this time in a state court. In *Boyle*, three students were charged, both criminally and by the University, with sexual assault—a virtual repeat of *Gabrilowitz*. Although U.R.I. acknowledged that it should allow the students' attorneys to assist them at their hearing, it sought to prevent the attorneys from cross-examining the University's witnesses. Ultimately, the Rhode Island Superior Court[95] ruled that U.R.I. need not allow cross-examination by counsel.[96]

In *McLaughlin v. Massachusetts Maritime Academy*,[97] students' right to the assistance of counsel when facing criminal charges was reaffirmed. The plaintiff, a cadet at the Academy, was arrested off-campus for the possession of drugs. He was later charged for the same incident by the school's disciplinary board. His request that his attorney be present at his hearing was denied by the board. He then sought injunctive relief, requiring the Academy to allow him the assistance of counsel. In granting the injunction, the district court simply followed the precedent established by *Gabrilowitz*.[98]

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[90] *Id.* at 104.

[91] *Id.* at 103-04.

[92] *Id.* at 106.

[93] *Id.*

[94] No. 79-335 (Ct. App. R.I. 1980).

[95] Superior Courts in Rhode Island are the state's trial courts.

[96] *See* Note, *supra* note 39, at 2148-49.

[97] 564 F. Supp. 809 (D. Mass. 1983).

[98] *Id.* at 812-13.

Similarly, in *Hart v. Ferris State College*,[99] the court again held that students have a right to counsel when facing both criminal and disciplinary charges stemming from the same incident. In *Hart*, the plaintiff sought to enjoin the College from holding her disciplinary hearing until the criminal matter was resolved. The district attorney had announced his intention to subpoena the disciplinary hearing transcripts for use in the plaintiff's criminal trial. Among other things, the plaintiff asserted that she would be denied due process were her attorney not allowed to cross-examine the witnesses against her. The court denied the injunction, believing that the student's right to consult with counsel and to have counsel make a statement for her, as provided by the College's disciplinary procedures, afforded adequate protection.[100] In so holding, the court relied heavily on *Gabrilowitz*.[101]

It is interesting to note that *Gabrilowitz* and *McLaughlin* did not discuss several alternative means of protecting the students' rights. For example, the courts might have stayed the disciplinary proceedings until the criminal trials were completed. The courts could have fashioned an exclusionary rule, holding that if the university disciplinary proceedings preceded the disposition of criminal charges arising out of the same alleged misconduct, the students' testimony in the hearing would be inadmissible in later criminal trials.[102] The courts' decisions not to stay the disciplinary proceedings can probably be traced to a reluctance to interfere significantly with schools' legitimate interests in resolving student disciplinary problems.[103] The limited role of counsel allowed was viewed by the courts as only slightly intrusive, and seemed to place no administrative or financial burden on the universities.[104] Further, allowing students the assistance of counsel was simply easier than fashioning a new exclusionary rule, especially when some case law already recognized the right to counsel in disciplinary proceedings.[105] The *Hart* court did discuss the student's option to remain silent during her hearing since in the College's disciplinary procedure, her silence could not be used against her.[106] The court rejected that option, however, because it did not allow the student to "control the direction of the current of her hearing."[107]

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[99] 557 F. Supp. 1379 (W.D. Mich. 1983).

[100] *Id.* at 1385-88.

[101] *See id.* at 1386-88.

[102] See Comment, *supra* note 70, at 736-37.

[103] See Gabrilowitz v. Newman, 582 F.2d 100, 106 (1st Cir. 1978).

[104] *See id.*; McLaughlin v. Massachusetts Maritime Academy, 564 F. Supp. 809, 812 (D. Mass. 1983).

[105] *See Gabrilowitz*, 582 F.2d at 104. The court cited Mills v. Board of Educ. of the Dist. of Colum., 348 F. Supp. 866 (D.D.C. 1972), Givens v. Poe, 346 F. Supp. 202 (W.D. N.C. 1972), and Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965, 90 S. Ct. 2169 (1970) (holding that due process includes the right to counsel in student expulsion proceedings).

[106] *Hart*, 557 F. Supp. at 1385.

[107] *Id.* at 1385 (quoting *Gabrilowitz*, 582 F.2d at 104).

V. ACADEMIC VERSUS DISCIPLINARY DECISIONS: A STUDENT RIGHTS DICHOTOMY?

Students may face suspension or dismissal for reasons other than the violation of university rules, misconduct, or more serious matters, such as the commission of crimes. Students are often required to leave universities because of academic failure or academic misconduct, such as cheating and plagiarism. Although the outcome is the same whether a student is expelled for the commission of a crime or for academic deficiencies, courts view the two quite differently.

A. *Due Process in the Academic Context*

In *Board of Curators of the University of Missouri v. Horowitz*,[108] the Supreme Court assessed students' due process rights in wholly academic proceedings. In so doing, the Court followed the traditional rule of judicial deference to academic expertise in the educational process.[109]

Charlotte Horowitz, a medical student, was dismissed for deficiencies in clinical performance, peer and patient relations, and personal hygiene. After faculty members repeatedly expressed dissatisfaction with her clinical work she was advanced to her final year on academic probation. Her poor clinical evaluations continued, and the school's council on evaluation postponed her graduation and recommended that she be dismissed, absent "radical improvement."[110] She was then allowed to take a special set of oral and practical tests, administered by practicing physicians in the area, as a means of appealing the council's decision. After receiving unfavorable reports from the physicians, the council reaffirmed its recommendation. At the end of the academic year, and after further negative reports on her clinical work, the council recommended her dismissal from the University. The school's coordinating committee, the dean, and ultimately the provost for health sciences affirmed the decision.

In holding that Horowitz's due process rights were not abridged, the Court stated:

> [She] has been awarded at least as much due process as the Fourteenth Amendment requires. The school fully informed [her] of the faculty's dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment. The ultimate decision to dismiss [her] was careful and deliberate. These procedures were sufficient under the Due Process Clause of the Fourteenth Amendment.[111]

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[108] 435 U.S. 78, 98 S. Ct. 948 (1978).

[109] *See* Note, Board of Curators of the University of Missouri v. Horowitz: *Student Due Process Rights and Judicial Deference to Academic Dismissals*, 15 WILLAMETTE L. REV. 577 (1979).

[110] *Horowitz*, 435 U.S. at 97, 98 S. Ct. at 959.

[111] *Id.* at 85, 98 S. Ct. at 952.

The Court also observed that the University went beyond the constitutionally-required due process by allowing Horowitz to be examined by independent physicians, thereby making certain that its assessment of her skills was correct.[112] So long as academic administrators make the decision to expel a student "carefully and deliberately," then, the student has received sufficient due process.

Judicial deference to academic decisions continues today. In *Regents of University of Michigan v. Ewing*,[113] a case involving the alleged infringement of a student's substantive[114] rather than procedural due process rights, the Supreme Court upheld the dismissal of a student with a history of low grades and poor exam scores in a medical program. The Court observed that when asked to review genuinely academic decisions, judges should show great respect for the faculty's professional judgment.[115] Further, the Court reasoned that courts may not override academic judgments unless they are "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[116]

The extent to which judicial deference to administrators' and professors' judgment impairs students' due process rights in wholly academic proceedings probably depends on the facts of the particular case. In *Horowitz*, for example, if one considers the examinations administered by independent practicing physicians to be the equivalent of a hearing before an impartial tribunal, Charlotte Horowitz received due process equal to or greater than that to which she would have been entitled had the *Dixon* requirements been the prevailing standard.[117] The problem, of course, is that the sweeping discretion granted by the Court to universities in academic proceedings provides great potential for abuse.

B. *Academic Misconduct as Compared to Academic Competence: Due Process and the Right to Counsel*

Horowitz involved a university's expertise and judgment in evaluating the academic competence of a student. The Supreme Court distinguished that situation from cases in which students face disciplinary charges stemming from violations of rules of conduct.[118] The implication of *Horowitz* is that students charged with acts of academic misconduct (as compared with academic competence), such as cheating or plagiarism, should be afforded greater procedural protection. Courts apparently treat academic misconduct in the same manner as disciplinary misconduct, holding that students who receive notice of the charges against them and a hearing have received due process.[119]

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[112] *Id.*

[113] 474 U.S. 214, 106 S. Ct. 507 (1985).

[114] Substantive due process refers to constitutional limitations on the content of state action. See J. Nowak, R. Rotunda & J. Young, Constitutional Law 430 (2d ed. 1983).

[115] See *Ewing*, 474 U.S. at 225, 106 S. Ct. at 513.

[116] *Id.*

[117] Ms. Horowitz was clearly given notice of her deficiencies.

[118] *Horowitz*, 435 U.S. at 86, 98 S. Ct. at 953.

Courts' treatment of academic and disciplinary misconduct also appears equal with regard to students' right to counsel. In *University of Houston v. Sabeti*,[120] a student suspended for cheating alleged that he was denied due process when his attorney was not allowed to question and cross-examine witnesses at his hearing. Noting that the student was not entitled to the assistance of counsel in the first place,[121] the court held that counsel's role was properly limited to advising the plaintiff.[122] The latter determination was completely in line with *Gabrilowitz v. Newman*, limiting counsel to an advisory role.

In *Henson v. Honor Committee of University of Virginia*,[123] a law student was suspended by the University after the law school's honor committee found him guilty of cheating. He alleged that he was denied due process when his attorney was not allowed to conduct his defense. The student was assisted by two law students, who consulted extensively with his attorney.[124] The honor committee was comprised of law students. Although the court did not expressly state that the student had a right to counsel under the circumstances, it implicitly recognized the right.[125] Thus, *Henson* is much like *French v. Bashful*,[126] which held that students have a right to counsel in disciplinary hearings in which universities proceed through counsel. In *Henson*, the University of Virginia effectively proceeded through counsel by allowing a group of law students to administer its law school's disciplinary system.

A comparison of students' due process rights, including the right to counsel, in disciplinary cases with such rights in academic competence cases indeed presents a dichotomy. Students in academic competence cases have severely restricted rights; so long as administrators exercise "professional judgment" when making their decisions, students who are suspended or expelled have received all the process they are due. At the opposite end of the spectrum are students charged with disciplinary misconduct; they are entitled to notice of the charges against them, an opportunity to be heard and, under some circumstances, the assistance of counsel. Disciplinary and academic misconduct cases, however, are quite similar.[127] In both instances students apparently have a right to counsel when universities proceed through counsel, and such counsel is generally limited to advisory roles. In this light, the academic-disciplinary dichotomy disappears.[128]

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[119] *See, e.g.*, Henson v. Honor Comm. of Univ. of Va., 719 F.2d 69 (4th Cir. 1983); University of Houston v. Sabeti, 676 S.W.2d 685 (Tex. Ct. App. 1984); Hall v. Medical College of Ohio, 742 F.2d 299 (6th Cir. 1984).

[120] 676 S.W.2d 685 (Tex. Ct. App. 1984).

[121] *Id.* at 687-88 (citing Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961); Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729 (1975)).

[122] 676 S.W.2d at 687-88.

[123] 719 F.2d 69 (4th Cir. 1983).

[124] *Id.* at 74.

[125] *Id.* at 73-75.

[126] 303 F. Supp. 1333 (E.D. La. 1979), *appeal dismissed*, 425 F.2d 182 (5th Cir.), *cert. denied*, 400 U.S. 941, 91 S. Ct. 232 (1970), *supra* notes 63, 75-80, *infra* note 159 and accompanying text.

VI. PUBLIC VERSUS PRIVATE INSTITUTIONS

The overwhelming majority of cases involving students' due process rights, among them the right to counsel, have involved public universities.[129] This is because, as agencies of the state, public universities' actions are "state actions," subject to fourteenth amendment limitations.[130] As a rule, constitutional guarantees of due process do not bind private universities, unless plaintiffs can somehow bring the imposition of sanctions within the scope of state action.[131]

A. *State Action: A Jurisdictional Barrier*

Historically, plaintiffs at private universities have attempted to demonstrate state action on the part of institutions by applying either "public function" or "government contacts" theories.[132] According to the public function theory, when a private school performs a function generally considered to be a responsibility of the government, such as providing citizens of a state with higher education, its actions may be considered state actions.[133] The government contacts theory holds that when a private college obtains substantial resources from the government, its actions amount to state actions.[134] Although plaintiffs met with some success under both theories,[135] victories were rare. This was due in large part to the vagueness of what exactly constituted state action, and the reluctance of courts to intervene.[136]

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[127] *See, e.g.*, Nash v. Auburn Univ., 621 F. Supp. 948, 957 (M.D. Ala. 1985) (no right to counsel in academic misconduct case when no criminal charges are pending and the University does not proceed through counsel).

[128] A discussion of a student's right to counsel when facing impending criminal charges arising out of the same set of facts that gave rise to the academic charge (analogous to *Gabrilowitz*) has been purposely ignored. There is no authority upon which to base such a discussion, and it is difficult to imagine such a situation ever materializing.

[129] *See* Faccenda & Ross, *Constitutional and Statutory Regulation of Private Colleges and Universities*, 9 VAL. U.L. REV. 539, 540 (1975).

[130] *See supra* note 38.

[131] W. KAPLIN, *supra* note 53, at 312.

[132] *Id.* at 18.

[133] *Id.*

[134] *Id.*

[135] *See, e.g.*, Buckton v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973), in which it is stated:

> [Boston University], though a private institution, clearly performs functions governmental in nature, such as providing higher education to and exercising substantial dominion over its students. . . . Moreover, state support to these defendants "through any arrangement, funds, or property," would inject state action into their conduct.

Id. at 1156.

In recent years both the public function and government contacts theories for establishing state action have been rejected. The Supreme Court expressly rejected the government contacts theory in 1982[137] and the public function theory was eliminated by a series of district and circuit court opinions.[138] In an attempt to clarify the state action doctrine, the Supreme Court, in *Lugar v. Edmonson Oil Co.*,[139] established a two-part test to determine if a private entity's actions were state actions:

> First the deprivation must be caused by the exercise of some right or privilege created by the state or a rule of conduct imposed by the state or by a person for whom the state is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.[140]

Applying the *Lugar* test in *Albert v. Carovano*,[141] the Second Circuit Court of Appeals held the actions of Hamilton College, a private institution, to be state actions. Because the College was chartered by the State of New York, it was required to adopt rules and regulations for the maintenance of public order on campus pursuant to the New York Education Laws.[142] Two students who were suspended by the College under the adopted regulations challenged their suspension on due process grounds. The court found that the first part of the *Lugar* test was met by the College because faculty members and administrators testified that Hamilton would never have adopted the regulations had it not been required to do so by the state.[143] The second part of the test was met because the Hamilton College personnel charged with enforcing the regulation did so as the result of "significant state encouragement," thereby making their conduct "otherwise chargeable to the state."[144]

When private colleges enact rules and regulations required by state law, then, *Carovano* makes it clear that students charged with violations of those rules and regulations must be afforded due process. If those violations are also criminal offenses, or if the colleges proceed through counsel in their enforcement, due process would include the right to counsel. The implications of this new standard will most likely be felt in disciplinary actions resulting from hazing incidents. Several states have passed laws requiring private colleges to adopt anti-hazing policies and means for their enforcement.[145] Absent state laws or administrative regulations applicable to student conduct at private colleges and universities, state action, as specified by *Lugar*, seems unlikely to be found.[146]

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[136] Faccenda & Ross, *supra* note 129, at 543.

[137] Rendell-Baker v. Kohn, 457 U.S. 830, 102 S. Ct. 2764 (1982) (private school's receipt of public funds did not make its discharge decisions state actions even though virtually all of the school's income was derived from government funding).

[138] *See* Young, *The Student/Institutional Relationship: A Legal Update*, RISK MANAGEMENT AND THE STUDENT AFFAIRS PROFESSIONAL 17 (H. Owens ed. 1984).

[139] 457 U.S. 922, 102 S. Ct. 2744 (1982).

[140] *Id.* at 937, 102 S. Ct. at 2753-54.

[141] 824 F.2d 1333 (2d Cir. 1987).

[142] *Id.* at 1336-37.

[143] *Id.* at 1340.

[144] *Id.* at 1341.

B. *Cracks in the Barrier*

Students at private universities who are unable to prove state action by their institutions are not necessarily unprotected. For years courts have chipped away at the state action barrier. As a result, students may have a right to counsel at private colleges and universities.

Courts have most often enforced students' rights by requiring private universities to abide by fair and reasonable disciplinary procedures. This is often based in part on universities' violation of their own disciplinary procedures, and is a hybrid of traditional contract law protections and constitutional limitations applied regardless of the absence of state action. In one of the earliest cases in this line, *Ryan v. Hofstra University*,[147] the plaintiff was expelled by the University in violation of its own disciplinary procedures. Ordering the plaintiff reinstated, the court ruled that "Hofstra University, though termed a 'private university', cannot expel, bar, and fine a student without following fair and reasonable procedures . . . . It must abide by Constitutional principles of fair conduct implicit in our society."[148] The court based its decision on its concept of justice as a basic societal expectation, one which should not be affected by a questionable distinction between public and private actors. Similarly, in *Kwiatkowski v. Ithaca College*,[149] another New York court found it "imperative that the college or university's decision to discipline [students] be predicated on procedures which are fair and reasonable."[150] The notion that private universities should recognize their students' constitutional rights out of "fairness" was embraced by some members of the academic community even before *Ryan* and *Kwiatkowski*,[151] and appears to have gained wider acceptance since.

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[145] *See, e.g.*, the following state statutes: ME. REV. STAT. ANN. tit. 20-A, § 10004 (1987); MASS. GEN. L. ch. 269, §§ 17-19 (1987); MO. REV. STAT. §§ 578.360-365 (1987); N.C. GEN. STAT. §§ 14-35, -36, -38 (1986); 24 PA. CONS. STAT. §§ 5352-54 (1987).

Further, hazing and the harm resulting from it are particularly likely to result in criminal charges being filed against participants, who also face university disciplinary charges, circumstances under which students at public universities are entitled to the assistance of counsel.

[146] See, e.g., Kusnir v. Leach, 439 A.2d 223 (Pa. Commw. Ct. 1982). In *Kusnir*, the court required Clarion State College, as a Commonwealth agency, to adhere to Pennsylvania's administrative laws. As a result, the College had to allow a student to be assisted by counsel at his disciplinary hearing. Although the College in *Kusnir* was a state institution, the effect that the state's administrative regulations, and not the statutes, had on the College's disciplinary process remains illustrative.

[147] 324 N.Y.S.2d 964 (N.Y. Sup. Ct. 1971).

[148] *Id.* at 968.

[149] 368 N.Y.S.2d 973 (N.Y. Sup. Ct. 1975).

Finally, some courts are not sure whether to distinguish between public and private universities. *Slaughter v. Brigham Young University*[152] involved the expulsion of a student for academic misconduct. In upholding the student's dismissal, the court assessed whether the University's action was arbitrary in light of the adequacy of the procedure, and the substantiality of the evidence upon which the University relied.[153] In reviewing the procedure, the court used constitutional due process as a guide, ruling:

> We hold that these proceedings met the requirements of the Constitutional due process doctrine as it is presently applied to public universities. It is not necessary under these circumstances to draw any distinction, *if there be any*, between the requirements in this regard for public and private institutions (emphasis added).[154]

Although the doctrinal bases for procedural rights may differ between public and private colleges, and most courts continue to afford private institutions greater flexibility, the law appears to be moving toward a similarity of treatment.[155] Thus, administrators at private universities should recognize that their students may enjoy a right to counsel under the same circumstances as students at public universities.

VII. PERIPHERAL ISSUES RELATED TO THE RIGHT TO COUNSEL

In criminal cases, defendants' right to counsel attaches at the initiation of formal adversarial judicial proceedings,[156] although no right to counsel applies unless defendants are actually incarcerated as a result of the prosecution.[157] Generally, defendants must be informed of their right to counsel and, if they cannot afford attorneys, counsel will be appointed for them. Must students who are entitled to the assistance of counsel be informed of that right? If students have a right to counsel, but cannot afford attorneys, must universities hire attorneys for them? The answers are: perhaps and no.

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[150] *Id.* at 977.

[151] *See* Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1036 (1969) ("[I]t seems to me unthinkable that the faculty and administration of any private institution would consider recognizing fewer rights in their students than the minimum the Constitution exacts of the state universities.").

[152] 514 F.2d 622 (10th Cir. 1975).

[153] *Id.* at 625.

[154] *Id.*

[155] W. KAPLIN, *supra* note 53, at 294.

[156] Kirby v. Illinois, 406 U.S. 682, 688, 92 S. Ct. 1877, 1882 (1972).

[157] Scott v. Illinois, 440 U.S. 367, 373-74, 99 S. Ct. 1158, 1165 (1979).

University disciplinary proceedings are not analogous to criminal trials.[158] Thus, many constitutional protections inherent in criminal procedure are inapplicable to the university disciplinary process. In *French v. Bashful*, the first student discipline case to address the issue of appointed counsel, the court, in dictum, opposed appointed counsel:

> When the right to retain counsel is involved, we feel that any burden which such a right places on the university is inconsequential. . . . But a similar holding as to appointed counsel would have a far greater effect on the university. If a college administration were forced to provide counsel for defendant students . . . the cost to the school would be considerable. It is no secret that universities are not unlimited in their funds. It is therefore this Court's opinion that this would be too high a price for a college to pay for the privilege of enforcing discipline among its students.[159]

No cases have been decided since *French* which suggest that universities must provide indigent students with counsel. What was once dictum in *French* has apparently become the rule.

Whether universities must advise students of their right to counsel when appropriate is less clear. It is important to note that so advising students places little or no administrative or financial burden on universities. Balancing that light burden with students' vital interests in the assistance of counsel, courts might conclude that colleges must inform students of their right to counsel.[160] Further, by advising students of their rights, university administrators might avoid litigation when students who should have been assisted by counsel, but were not, seek remedies. Indeed, informing students of their right to counsel seems both reasonable and prudent.

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[158] *See generally* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961) (full-dress judicial hearing with the right to cross-examine witnesses not required); Gorman v. University of R.I., 837 F.2d 14 (1st Cir. 1988) ("[T]he question presented is whether . . . the individual has had an opportunity to answer, explain, and defend, and not whether the hearing mirrored a common law criminal trial.").

[159] 303 F. Supp. 1333, 1338 (E.D. La. 1969).

[160] The use of a balancing test to determine whether procedural due process requirements have been satisfied is routine. The Supreme Court, in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976), established a framework for analyzing procedural due process cases. In *Mathews*, the court required consideration, or a balancing, of three factors: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of the interest . . . and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved, and the fiscal administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 335.

For an application of the *Mathews* balancing test in a university disciplinary proceeding, see Hart v. Ferris State College, 557 F. Supp. 1379, 1387-88 (W.D. Mich. 1983); *see also* Golden, *College Student Dismissals and the Eldridge Factors: What Process is Due?*, 8 J.C.U.L. 495 (1981-82).

VIII. SOME THOUGHTS ON THE RIGHT TO COUNSEL

The current judicial concepts of due process on campus and students' right to counsel create an interesting blend of respect for universities' interest in maintaining discipline, concern for universities' administrative and financial resources, and a desire to protect students' rights. "The system" relies in large part on the integrity of individual university administrators for the protection of students' rights. For the most part this confidence appears well-placed and, as a practical matter, students seldom need (or want) the assistance of counsel in disciplinary proceedings.[161]

Students' right to counsel has been at issue only when individual administrators have exercised questionable judgment and trampled on students' rights. One has to wonder why, for example, the University of Rhode Island in *Gabrilowitz* and *Boyle* did not allow cross-examination by defense counsel. Even if cross-examination would have greatly extended hearing time or made University witnesses uncomfortable, these would seem to be light administrative burdens to a University seeking the truth.[162] This is even more apparent when the charge is a serious one, such as rape. For that matter, why, in *Gabrilowitz*, did U.R.I. not allow Steven Gabrilowitz to be assisted by counsel in the first place? Student affairs administrators should have students' best interests at heart, and "no . . . administrator can believe that when students face impending criminal charges . . . those students should be forced to weigh the risks between institutional punishment and self-incrimination without the [assistance] of counsel."[163] In most cases, universities incur far greater administrative and financial burdens[164] by contesting students' right to counsel than they would if they allowed attorneys' participation.[165] In situations such as those in *Gabrilowitz*, *Boyle*, and *McLaughlin*, the universities could have saved themselves time and expense through the promulgation of simple policies postponing university disciplinary proceedings until the resolution of related criminal matters.[166] In short, students' right to counsel should not be the issue that universities often make it out to be.

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[161] This observation is based on the author's experience as a student affairs administrator at three colleges and universities.

[162] "Cross-examination has long been recognized as one of the best methods for determining truth, and a trained trial attorney is the best person to employ that method." Note, *supra* note 39, at 2149.

[163] D. Richmond, Due Process On Campus: Students' Right to Counsel 13-14 (manuscript accepted July, 1988, for publication by C. STUDENT AFFS. J.).

[164] For example, in Picozzi v. Sandalow, 623 F. Supp. 1571 (E.D. Mich. 1986), the University of Michigan spent approximately $100,000 litigating the plaintiff's due process rights. *See* Note, *supra* note 39, at 2150 n.86.

[165] *See id.* at 2149.

CONCLUSION

Despite significant developments in the recognition of students' constitutional rights on college and university campuses, students' right to counsel in disciplinary proceedings remains very limited. Only when institutions proceed through counsel (or the equivalent thereof, such as law students), or students face impending criminal charges arising out of the same set of facts as do the disciplinary proceedings, are students entitled to the assistance of counsel. Even then, attorneys are usually allowed to function only as observers and advisors—not as advocates.

Whether students' right to counsel will soon evolve further is questionable. If students' right to counsel is broadened, it will probably be on a case-by-case basis. With no significant case law developments since *Gabrilowitz* in the late 1970's, a general expansion of students' right to counsel through allowing assistance by counsel at most suspension or expulsion proceedings seems improbable.

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[166] An example of such a policy may be found at the University of Kansas regarding violation of law and University discipline:

> If a violation of law occurs on campus and is also a violation of a published University regulation, the University may institute its own proceedings against an offender who has been subjected to civil prosecution only if the University interest involved is clearly distinct from that of the community outside the University. Ordinarily, the University should not impose sanctions if public prosecution of a student is anticipated or until law enforcement officials have disposed of the case.

THE UNIVERSITY OF KANSAS, YOU AND THE UNIVERSITY OF KANSAS, STUDENT HANDBOOK, 1988-89.

Suspension of students prior to the completion of college and university disciplinary proceedings ought to be acceptable if the students' continued presence on campus presents an imminent danger of physical harm. However, students must then be provided with hearings as soon as possible. See Note, *supra* note 39, at 2157-58.

Prohibiting Discriminatory Harassment by Regulating Student Speech: A Balancing of First-Amendment and University Interests[*]

Patricia B. Hodulik[**]

Introduction

Like many other colleges and universities, the University of Wisconsin System recently has witnessed a disturbing increase in racist and discriminatory conduct on campus. Incidents range from the clumsily offensive "humor" of a mock slave auction to the anonymous call of "nigger" from a crowd; from racist caricatures on posters to epithets scrawled on the mirrors and walls of private living quarters. The reports of the victims attest to the pain caused by such episodes. The damage to the University is perhaps less palpable, but no less real. Recurring instances of discriminatory behavior undermine institutional efforts to provide equal access to education and to improve the educational environment for all students. They also erode the tolerance that is fundamental to the existence of a university community. Because of the harm done to both individuals and the university, the University of Wisconsin System—like other colleges and universities—has responded to discriminatory, harassing behavior with efforts to regulate the conduct of staff and students in this area.[1]

This type of regulatory effort, however, implicates academic freedom and free-speech rights protected under the first amendment to the United States Constitution. Much discriminatory, harassing conduct takes the form of verbal or otherwise "expressive" behavior, thus raising questions as to whether it merits constitutional protection. Attempts to prevent or to prohibit discriminatory harassment through university regulations must, therefore, be tempered by sensitivity to individual rights of free speech. Successful and legally-sustainable regulation ultimately requires balancing values associated with equality of educational opportunity and those related to freedom of expression in an academic setting.

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[*] Copyright 1989 Patricia B. Hodulik. As this Article was going to press, an action was filed challenging the constitutionality of the Wisconsin rule. The lawsuit, UWM Post, *et al.* v. Board of Regents of the University of Wisconsin System, Case No. 90-C-0328 (Eastern District of Wisconsin), alleges that the rule, on its face, violates the first and fourteenth amendments to the United States Constitution and Article I, sections 1 and 3, of the Wisconsin Constitution. The plaintiffs contend that the rule is overly broad and vague, and inhibits their exercise of constitutional rights. They seek declaratory and injunctive relief against the Board of Regents. At this writing, the Board has not filed its answer to the complaint.

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[1] The University of Michigan, Stanford University, the University of Massachusetts at Amherst, the University of North Carolina, and the University of California at Berkeley, among others, have considered or adopted discriminatory-harassment policies.

The Wisconsin effort to regulate discriminatory harassment by students illustrates the legal and policy difficulties inherent in any attempt to proscribe conduct in this area. This Article discusses, in the context of the Wisconsin experience, the legal and policy reasons for regulating discriminatory harassment by students, and suggests a constitutionally sound framework for regulation.

I. History of the Wisconsin Regulation

The University of Wisconsin System initiated its formal effort to regulate discriminatory harassment in late 1987, following several highly publicized incidents of racist and racially-harassing behavior on Wisconsin campuses. In one episode, a fraternity held a party featuring a "Harlem room," in which it served fried chicken and watermelon punch, and students wore black-face. In another, a fraternity placed a large cardboard caricature of a black man on its lawn to announce a "Figi Island" party.[2] And in still another, racist name-calling led to an altercation involving students at a fraternity house.[3] As public attention focused on these incidents, minority students reported a number of other instances in which abusive language and racial epithets were applied to them.[4] The apparent increase in such episodes emphasized the problem of campus racism in general, and the need for the University to consider appropriate responses to the particular kinds of racially-motivated expressive behavior occurring.

Existing University rules and policies governing student conduct did not address harassing verbal conduct and offensive expressive behavior by students. Absent a threat of physical danger or harm to property, Wisconsin's student-conduct rules provided no mechanism for the redress of harassing verbal or expressive behavior.[5] This deficiency in the student-conduct rules, and the frustration resulting from the University's inability to respond effectively to specific incidents of racist conduct, led to the formation of a committee at the University of Wisconsin-Madison campus charged with developing a policy on discriminatory conduct by students.[6]

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[2] See, e.g., Wis. State J., May 4, 1987.

[3] See, e.g., Wis. State J., Nov. 8, 1987.

[4] See, e.g., Wis. State J., Nov. 8, 1987.

[5] Wis. Admin. Code, Ch. UWS 17 (1975).

[6] Although a number of University of Wisconsin system institutions received reports of racist incidents, most attention focused on those occurring at the University of Wisconsin-Madison. As a result, the Madison campus took a leading role in addressing the problem.

During early 1988, as this campus committee began its work, the Board of Regents of the University of Wisconsin System reexamined systemwide efforts to improve educational opportunities for minorities and the economically disadvantaged. The quality of the campus environment emerged, in the course of the Regents' study, as a critical factor in attracting and retaining minority students. The study also identified responding effectively to episodes of discriminatory harassment as an important element in assuring a hospitable environment. *Design for Diversity*,[7] a comprehensive plan resulting from the Regents' study, addressed these issues by requiring that each University of Wisconsin campus prepare nondiscriminatory-conduct policies to address discriminatory harassment by faculty, staff and students.[8]

The approval of *Design for Diversity* in May, 1988 coincided with the completion of the Madison campus committee's work on a proposal to amend the *student*-conduct rules to prohibit verbal or expressive-discriminatory harassment. The Madison proposal was one possible response to the *Design for Diversity* requirement that each campus adopt policies on student-discriminatory harassment. Because only the Regents have the authority to amend the student-conduct code,[9] however, the Board circulated the Madison proposal to all other University of Wisconsin campuses for comment. The Board then appointed a systemwide working group to review the comments received, to determine whether a change in the conduct rules was needed and desirable, and to recommend to the Board necessary amendments. Concluding that the student-conduct code should be amended to prohibit discriminatory harassment, the working group drafted revisions during December, 1988 and January, 1989. After debate and public commentary at Regent meetings and before the state legislature, the Board adopted these revisions, with minor modifications, as administrative rules. The rules took effect September 1, 1989.

II. POLICY AND LEGAL AUTHORITY FOR THE WISCONSIN REGULATION

The working group and the Board of Regents considered various legal and policy principles in preparing the revised student conduct code. The drafters recognized that the University has not only the authority, but also the responsibility, to discourage discriminatory harassment.[10]

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[7] Official minutes of the Board of Regents of the University of Wisconsin System, May, 1988; Regent Policy Document 88-4 (University of Wisconsin System).

[8] *Design for Diversity*, Section III.A.2., provides that each institution of the University of Wisconsin System shall develop written codes of student and employee conduct to ensure a nondiscriminatory environment.

[9] WIS. STAT. § 36.35, L. 1973, c.335, § 7 1985 Act 332, § 251(1), eff. June 12, 1986, requires the Board of Regents to adopt administrative rules governing student conduct. The provisions of the Wisconsin Administrative Procedures Act, Chapter 227, Wisconsin Statutes govern the rule-making process.

[10] While the impetus for amending the student-conduct rules came from episodes of

Legal and policy principles establish the University's duty to provide equal access to education, to prevent interference with educational opportunities, and to regulate student conduct. The drafters also recognized, however, that any administrative rule limiting harassing speech or other expressive behavior must balance these policy commitments and legal duties against students' first-amendment rights and principles of academic freedom. As a result, the drafters examined first-amendment case law in defining the appropriate scope of university regulation of verbal and expressive discriminatory harassment. The Wisconsin rule-makers attempted to shape a rule narrow enough to withstand first-amendment scrutiny, but broad enough to serve the University's objective of discouraging discriminatory harassment.[11]

A. *The University's Authority and Duty to Regulate Discriminatory Harassment*

1. Equal Access to Education: Individual Rights and Institutional Obligations

Familiar legal principles establish the University's general duty to provide equal educational opportunities. As a state university, Wisconsin must act in accordance with the fourteenth amendment's[12] guarantee of equal protection in providing educational opportunities. As the United States Supreme Court stated in *Brown v. Board of Education*, "The opportunity of an education, where the state has undertaken to provide it, is a right which must be made available to all on all equal terms."[13] In addition, federal laws such as Title VI of the Civil Rights Act of 1964,[14] Title IX of the Education Amendments of 1972,[15] and Section

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racial harassment, both the Madison committee and the systemwide working group felt it appropriate and consistent with other nondiscrimination policies to extend the anti-harassment rule to cover all groups protected from discrimination by federal or state law or by policy of the Board of Regents. These protected categories include race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.

[11] The Madison committee proposal provided particularly valuable guidance to the systemwide working group and the Board of Regents in this effort. The Madison policy was the product of extensive legal research by faculty and students, and both the policy statement recommended by the committee and supporting materials were made available to the systemwide working group. The regulation recommended to—and with some modifications, ultimately adopted by—the Board of Regents, reflects and incorporates many of the principles contained in this proposal.

[12] U.S. CONST. amend. XIV.

[13] Brown v. Board of Educ., 347 U.S. 483, 493, 74 S. Ct. 686, 691 (1954); Regents of Univ. of Calif. v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 (1978).

[14] Title VI, Pub. L. No. 88-352, 42 U.S.C. § 2000d (1964), *et. seq.* "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[15] Title IX, Pub. L. No. 92-318, 20 U.S.C. § 1681 (1972), *et. seq.* prohibits discrimination on the basis of sex in federally-funded education programs.

504 of the Rehabilitation Act of 1973[16] mandate equal access to, and participation in, educational benefits for specific protected groups. Wisconsin state statutes establish similar requirements.[17] Moreover, the policies of the Board of Regents affirm the University's commitment to assuring equal access, and to complying with laws requiring equal access.[18] As consistently stated in its policy documents, the Board's goal is to achieve equality of educational opportunity for all students.[19]

Reasoning from employment-law principles and case law under Title IX concerning the sexual harassment of students, the Wisconsin working group concluded that verbal or expressive harassment of individuals based on their race or other protected characteristics is discriminatory, violating legal and policy guarantees of equal opportunity in education. In employment-law cases, courts have construed the equal employment opportunity guaranteed by Title VII of the Civil Rights Act of 1964[20] to afford employees the right to work in an environment free from discriminatory intimidation, ridicule and insult.[21] Cases arising under Title VII have recognized racial, ethnic-origin, and religious harassment as prohibited discrimination in the workplace.[22] Likewise, courts have held that sexual harassment—defined as discriminatory conduct in the guidelines of the Equal Employment Opportunity Commission[23]—violates Title VII.[24] Under these and similar state-employment rules,[25] courts may hold employers liable for discriminatory harassment in the workplace, and employers have a duty to take corrective action when harassment occurs.

Discriminatory harassment creates a work environment that is inherently unfair to its victims. It renders the terms and conditions of their employment unequal, undermining their ability to function effectively. An employer's tolerance of harassment is, therefore, a form of discrimination, which violates Title VII's assurance of equal employment opportunity.

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[16] 87 Stat. 394, 29 U.S.C. § 794 (1973).

[17] *See, e.g.*, WIS. STAT. ANN. §§ 36.11, 101.223, 101.225 (West 1966 & Supp. 1989) for state statutes prohibiting discrimination in educational programs.

[18] Regent Policy Documents, 72-7, 72-21, 80-3, 83-4, 83-5, 84-5, and *Design for Diversity*, *supra* note 8.

[19] *See, e.g.*, Regent Policy Document 84-5:

> The long range objective of the UW System is to achieve the goals of equality of access and of opportunity [for minority and disadvantaged students]. The achievement of these goals might be inferred from the attainment of a condition in which entry rates, academic success rates, graduation rates and distribution of educational and professional choices by minority students would more closely resemble those characteristics of all students of the UW System.

[20] 78 Stat. 253 (1964) (codified as amended, 42 U.S.C. § 2000e, *et. seq.* (1982 & Supp. V 1987)).

[21] Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65, 106 S. Ct. 2399, 2405 (1986).

[22] *See, e.g.*, Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506 (8th Cir. 1977), *cert. denied sub nom.*, Banta v. United States, 434 U.S. 819, 98 S. Ct. 60 (1977); Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976).

[23] EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (1988).

[24] *See Meritor Savings Bank, FSB*, 477 U.S. 57, 106 S. Ct. 2399 (1986); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Zabkowicz v. West Bend Co., 589 F. Supp. 780 (E.D. Wis. 1984).

[25] *See, e.g.*, WIS. STAT. ANN. § 111.32(13) (West 1966).

Harassment of students in the educational setting shares the characteristics of harassment in the workplace. It causes the same type of harm, tainting the environment, adversely affecting the ability of students to perform, and causing disparate treatment.[26] The ultimate result is inequality of educational opportunity for those who are the victims. By analogy to the employment setting, the University's general obligation to provide equality of educational opportunity includes the authority—and duty—to take policy action against discrimination in the form of harassment between and among students.

Sexual harassment cases arising under Title IX also support this conclusion. In *Alexander v. Yale University*,[27] a Connecticut District Court recognized for the first time that sexual harassment is a form of discrimination, actionable by students under Title IX. More recent cases also support such claims, on the theory that harassment discriminates by creating an environment hostile to education.[28] Recognition of sexual harassment as a kind of discrimination that violates Title IX suggests that harassment based on other protected characteristics likewise might be found to be impermissible discrimination under such statutes as Title VI, Section 504, or similar state provisions.[29] The sexual-harassment case law under Title IX thus provided further support for the University's authority and responsibility to prohibit discriminatory harassment.[30]

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[26] *See* Delgado, *Words that Wound*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); and Kretzmer, *Free Speech and Racism*, 8 CARDOZO L. REV. 445 (1987) (discussing the harms of racist speech). Anecdotal evidence to the same effect is abundant. *See* Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

[27] 459 F. Supp. 1 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980).

[28] *See* Moire v. Temple Univ. School of Medicine, 613 F. Supp. 1360 (D.C. Pa. 1985), *aff'd*, 800 F.2d 1136 (3d Cir. 1986); Lipsett v. University of Puerto Rico, 637 F. Supp. 789 (D. P.R. 1986). In *Moire*, the Court, relying on *Vinson*, 477 U.S. 57, 106 S. Ct. 2399, indicated that environmental sexual harassment was precluded under Title IX. *But see* Bougher v. University of Pittsburgh, 713 F. Supp. 139 (W.D. Pa. 1989) (stating that Title IX does not permit a hostile environment claim of sexual harassment of the kind described for the workplace, but reaches only "*quid pro quo*" harassment in which educational benefits are conditioned on the granting of sexual favors). For general commentary concerning the availability of a student cause of action for sexual harassment under Title IX, see Connolly and Marshall, *Sexual Harassment of University or College Students by Faculty Members*, 15 J.C.U.L. 381 (1989).

[29] *See supra* notes 14-17.

[30] This idea was, moreover, consistent with past action of the Wisconsin Regents in the area of sexual harassment. Following the adoption of the EEOC Guidelines on Sexual Harassment in 1980, and the *Yale* litigation, the Wisconsin Board of Regents adopted a policy statement on sexual harassment, prohibiting sexual harassment by faculty, staff and students of the Wisconsin System. Regent Policy Document 81-2 (University of Wisconsin System).

2. Preventing Interference with Education, Protecting Students, and Regulating Student Conduct

Additionally, more general institutional duties to prevent interference with education, to protect students, and to maintain order on campus demonstrated the need to regulate discriminatory harassment. The kind of personal harm caused by discriminatory harassment, as well as its capacity to disrupt educational activities, indicated that regulation, consistent with these general principles, would be appropriate.

The authority of universities to regulate student conduct and activities, thereby preserving order and preventing interference with education, is well-established. Universities have a legitimate interest in regulating student activities that "interfere with the opportunity of other students to obtain an education."[31] The University may prohibit activities that materially and substantially disrupt its work and discipline.[32]

Harassment impedes the educational process, and interferes with the educational pursuits of its victims. It damages individuals, impairing their ability to function in the academic environment. It is, moreover, a kind of assaultive behavior, which is inherently disruptive and very likely to precipitate further disorder.[33] In some instances, it may even constitute criminal activity.[34] Given these characteristics of harassment, university regulation is authorized not only to assure equal access to education, but to prevent interference with the educational process, and to preserve an orderly, safe campus environment.

B. *First-Amendment Analysis*

Convinced of the University's general authority and responsibility to prevent discriminatory harassment, the Wisconsin rule-drafters used first-amendment law principles in describing the expressive conduct subject to regulation, and in defining the permissible limits of regulation. The constitutional implications of regulating discriminatory harassment were particularly significant at Wisconsin both because it is a *state* institution,[35] and because it is dedicated to encouraging academic freedom, debate and "that fearless sifting and winnowing by which alone the truth can be found."[36] Concerned about the first-amendment impact of regulating harassing speech, Wisconsin adopted a cautious approach to rule-drafting, choosing to regulate only where governmental regulations on speech clearly were allowed.

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[31] Healy v. James, 408 U.S. 169, 189, 92 S. Ct. 2338, 2350 (1972); Widmar v. Vincent, 454 U.S. 263, 277, 102 S. Ct. 269, 278 (1981); Gay Student Services v. Texas A&M Univ., 737 F.2d 1317 (5th Cir. 1984), *cert. denied*, 471 U.S. 1001, 105 S. Ct. 1860 (1984).

[32] Tinker v. Des Moines Indep. Community School Dist. 393 U.S. 503, 513, 89 S. Ct. 733, 740 (1969); *Gay Student Services*, 737 F.2d at 1317, 1327. In the case of the University of Wisconsin System, the Board of Regents also possesses statutory authority to regulate student conduct, under Wisconsin Statutes § 36.35.

[33] See Delgado, *supra* note 26, discussing harms of racist speech. For commentary concerning the idea that words may become "projectiles" in a kind of speech assault, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 837 (2d ed. 1988).

[34] See, *e.g.*, WIS. STAT. ANN. § 947.013 (West Supp. 1989). *See* Note, *Student Discriminatory Harassment*, 16 J.C.U.L. 311 (1989).

[35] See, e.g., Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900 (1940).

First-amendment case law indicates that—despite its paramount position in the hierarchy of constitutional values—the right of free speech is not absolute. In appropriate circumstances, the government may limit or restrict speech; in addition, some types of speech and expressive behavior are beyond the scope of first-amendment protection altogether. Cases allowing incidental governmental restrictions on expressive activities suggested the University could limit harassing speech to serve its compelling, countervailing interests in preventing discrimination and interference with equal education opportunities.[37] Cases identifying types of speech *not* entitled to constitutional protection helped to define the scope and characteristics of the discriminatory harassing speech and expressive behavior the University could regulate.[38]

1. Constitutional Limits on Speech Activities and Expressive Behavior

Numerous first-amendment cases recognize the government's ability to limit speech and other expressive behavior, if the limitation is tailored narrowly to serve a substantial governmental interest.[39] In general, these cases recognize that one person's exercise of first-amendment rights may conflict with compelling governmental interests, or may interfere with another person's exercise of different—but equally important—protected rights, thus justifying governmental limitations on the first-amendment activities.

General time, place and manner restrictions are familiar examples of such constitutionally-acceptable limitations on speech activities.[40] Restrictions on first-amendment activities designed to protect unwilling listeners from becoming the recipients of unwanted speech are closely related, and also appropriate. In a variety of situations, ranging from door-to-door solicitations[41] and religious proselytizing,[42] to the use of the mails to send obscene material[43] and placement of political advertisements on city buses,[44] courts have recognized that—despite the rights of a particular individual or group to speak—other citizens have a right *not* to listen. The government may intervene to protect this right *not* to receive speech, particularly when the speech occurs in a place in which the potential listener has some expectation of being free from intrusion or interference, or from which the listener cannot readily depart.

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[36] Taken from a plaque in Bascom Hall, at the University of Wisconsin-Madison (quoting from the decision of the Board of Regents of the Univiversity of Wisconsin in a dispute concerning academic freedom).

[37] *E.g.*, Healy v. James, 408 U.S. 169, 92 S. Ct. 2338 (1972).

[38] *E.g.*, Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508-09, 89 S. Ct. 733, 737 (1969).

[39] *E.g.*, Widmar v. Vincent, 454 U.S. 263, 277, 102 S. Ct. 269, 278 (1981).

[40] City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118 (1984) (placement of campaign advertising on city's sign poles); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S. Ct. 3065 (1984); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925 (1986); Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 101 S. Ct. 2559 (1981); State v. Horn, 126 Wis. 2d 447, 377 N.W.2d 176 (Ct. App. 1985).

[41] Martin v. Struthers, 319 U.S. 141, 63 S. Ct. 862 (1943).

[42] Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900 (1940).

Incidental limitations on speech also are permitted in public-employment situations,[45] and in circumstances in which there is potential harm to certain groups of listeners, such as the very young,[46] or in which speech and non-speech elements are combined in such a way that the regulation of the non-speech elements has an incidental effect on "pure" speech.[47]

Further restrictions on speech in an educational setting may be sustained when necessary to serve important governmental and individual interests in preventing interference with educational opportunities. These interests have been described as proper bases for limiting the exercise of first-amendment rights in schools and universities.[48] As the Supreme Court stated in *Tinker v. Des Moines Independent Community School District*: "[C]onduct by [students], in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of free speech."[49] Similarly, in *Widmar v. Vincent*, the Court affirmed the university's right to "exclude first-amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education."[50]

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[43] Rowan v. United States Post Office Dep't, 397 U.S. 728, 90 S. Ct. 1484 (1970).

[44] Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S. Ct. 2714 (1974).

[45] Connick v. Myers, 461 U.S. 138, 103 S. Ct. 1684 (1983); Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 99 S. Ct. 693 (1979); Pickering v. Board of Educ., 391 U.S. 563, 88 S. Ct. 1731 (1968); Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1987).

[46] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 106 S. Ct. 3159 (1986); FCC v. Pacifica Found., 438 U.S. 726, 98 S. Ct. 3026 (1978); Olesen v. Board of Educ. of Sch. Dist. No. 228, 676 F. Supp. 820 (N.D. Ill. 1987).

[47] United States v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673 (1968). In Johnson v. Texas, 109 S. Ct. 2533 (1989), the Supreme Court applied the *O'Brien* analysis in a case involving a prosecution for burning the American flag. The Court held that the flag-burning was a purely symbolic, expressive act, and thus protected by the first amendment. Discriminatory harassment does not share this quality of "pure symbolism." Most significantly, harassment is not an act directed at an inanimate object representing a set of values, but is a sort of verbal assault, directed at other human beings and the cause of identifiable harm to them. *See supra* notes 33 and 34. In the context of the *O'Brien* and *Johnson* analyses, therefore, discriminatory harassment may be subjected to regulation because it is conduct combining speech (the verbal or expressive act) with non-speech (the attack on another person) elements.

[48] Healy v. James, 408 U.S. 169, 92 S. Ct. 2338 (1972).

[49] Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 513, 89 S. Ct. 733, 740 (1969).

[50] Widmar v. Vincent, 454 U.S. 263, 277, 102 S. Ct. 269, 278 (1981). *See also*, Bob

These first-amendment principles provided support for the University's authority to impose incidental restrictions on racist and discriminatory speech to serve critical governmental and individual interests in achieving equal educational opportunity, and in preventing discrimination and interference with the educational process. As the cases also made clear, however, the regulation must be narrowly drawn, identifying the abusive speech activities sought to be restricted, and demonstrating the harmful impact of such speech on other substantial individual and university interests.

Employment-law concepts—so significant in concluding that harassing speech denies equal educational access—also proved useful in narrowing the Wisconsin regulation for first-amendment purposes. Workplace principles limit expressive behavior that demeans on the basis of protected characteristics and creates a hostile work environment.[51] This description of the relationship between harassing speech and its adverse effects on important employment interests suggested an analogy for the educational setting. Borrowing from the structure of the workplace rules, the Wisconsin regulation prohibits discriminatory speech or expressive behavior that demeans race, sex, religion, color, creed, disability, sexual origin, national origin, ancestry or age and interferes with the University's interest in assuring equal educational opportunities by creating a hostile environment for "education, university-related work, or other university-authorized activity."[52]

2. Categories of Speech Not Entitled to First-Amendment Protection: "Fighting Words"

Additional elements of the harassing speech prohibited by Wisconsin's rule were based on constitutional principles *excluding* some categories of speech from first-amendment protection. As Justice Holmes noted in *Schenk v. United States*, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[53] Similarly, defamation, obscenity,[54] and "fighting words," are beyond the scope of constitutional protection. Because of the parallels

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Jones Univ. v. United States, 461 U.S. 574, 103 S. Ct. 2017 (1983), in which the Supreme Court recognized a compelling governmental interest in eradicating racial discrimination in education, sufficient to justify a limitation on the first-amendment right to the free exercise of *religion*. In that case, the university faced loss of federal tax exempt status because of its racially discriminatory policies. The Court determined that the government's fundamental interest in eliminating discrimination in education outweighed the incidental burden on the free exercise of religion resulting from the university's loss of its exempt status.

[51] See *supra* notes 20-25.

[52] Wis. Admin. Code § UWS 17.06(2) (1989).

[53] 249 U.S. 47, 39 S. Ct. 247 (1919).

[54] See, *e.g.*, New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 719 (1964); Beauharnais v. Illinois, 343 U.S. 250, 72 S. Ct. 725 (1952); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S. Ct. 2678 (1973).

between this last category of speech and racist and discriminatory comments, the "fighting-words" doctrine provided key elements in regulating discriminatory harassment.

"Fighting words" do not enjoy first-amendment protection because they are inherently inconsistent with first-amendment values and purposes. They do not contribute to any meaningful exchange of ideas; they do not advance the search for truth, and they are harmful to individuals.[55] The United States Supreme Court articulated these ideas in the seminal case of *Chaplinsky v. New Hampshire*:[56]

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the . . . insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[57]

The Court also noted that, because such "utterances are no essential part of any exposition of ideas [and are] of . . . slight social value as a step to truth . . .," they may be prohibited without violating the first amendment.[58]

Similarly, discriminatory insults, name-calling and abusive epithets have no value as a "step to the truth." They are inherently harmful, constituting a kind of verbal assault on the person to whom they are directed.[59] They are, further, unlikely to form any part of a dialogue or exchange of views. They are instead the kinds of words that incite reaction and cause harm without any opportunity for reply. Given these parallels between traditional "fighting words" and abusive discriminatory comments, *Chaplinsky* suggests a constitutional basis for prohibiting insulting, abusive, discriminatory speech.

Chaplinsky and later cases discussing the "fighting words" doctrine also indicate that, to be excluded from first-amendment protection, the prohibited speech must be *directed at* an individual and must be *intentional*. Several cases in which defendants invoked the first amendment as a defense for offensive language or behavior emphasize the importance of these additional elements.

In *Cohen v. California*,[60] Cohen appeared in court wearing a jacket that said "Fuck the draft." He successfully pleaded the first amendment as a defense to his prosecution for disturbing the peace. In *Hess v.*

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[55] *See* Delgado, *supra* note 26, and Tribe, *supra* note 33.

[56] 315 U.S. 568, 62 S. Ct. 766 (1942). Chaplinsky was convicted under a statute prohibiting adressing "offensive, derisive or annoying words" to others. The actual words he used were "You are a god-damned racketeer; you are a damned fascist."

[57] *Id.* at 572, 62 S. Ct. at 769-70.

[58] *Id.*

[59] *See* Delgado, *supra* note 26, and Tribe, *supra* note 33.

[60] 403 U.S. 15, 91 S. Ct. 1780 (1971).

Indiana,[61] Indiana cited for disorderly conduct a man who used a vulgarity during a Vietnam War demonstration. The man prevailed on his claim that the comment was constitutionally protected. In both cases, the Supreme Court noted that the first amendment does not provide absolute freedom to speak whenever or wherever one chooses. Referring to the "fighting-words" doctrine, however, the Court noted that in these particular situations "[n]o individual actually or likely to be present could reasonably have regarded the words . . . as a *direct personal insult*."[62] Thus, the expressive conduct in these situations was distinguished from "fighting words," and was protected by the Constitution. To be outside the scope of first-amendment protection and prohibited by the university, therefore, speech must be "directed at" someone, rather than be a generalized statement aimed at no one in particular.

Similar analysis suggested the need for a requirement that discriminatory speech be *intentional* to be prohibited consistent with the first amendment. The significance of an intent requirement is apparent from *Brandenburg v. Ohio*,[63] involving a first amendment-based challenge to a criminal syndicalism statute. In its decision in *Brandenburg*, the Supreme Court noted that—absent the intent to incite "imminent lawless action" and the likelihood of such action in fact resulting—even speech advocating crime or violent action is protected by the Constitution.[64] Given the importance of intent in this context, it appeared likewise appropriate to incorporate intent as a required element of the discriminatory harassment prohibited by the University.[65]

The "fighting-words" doctrine and related case law thus contributed several key elements to the regulatory framework for prohibiting discriminatory harassment. The doctrine suggested that insulting, abusive discriminatory speech *directed at* another person, and *intended to* produce some sort of harm to that person could be prohibited, consistent with the first amendment. These elements were incorporated into the rule proposed to, and ultimately approved by, the Board of Regents. Accordingly, in addition to the concepts drawn from cases allowing speech limitations to prevent interference with other constitutional rights and governmental interests, the Wisconsin regulation requires that the prohibited speech be discriminatory and demeaning ("discriminatory comments, epithets or other expressive behavior"); that it be *directed at* an individual; that it be *intended* to demean—on the basis of a protected characteristic—the person to whom it is directed; and that it be *intended* to interfere with education by creating a hostile environment for education and other university-related activities.[66]

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[61] 414 U.S. 105, 94 S. Ct. 326 (1973).

[62] 403 U.S. at 20, 91 S. Ct. at 1785-86 (emphasis added).

[63] 395 U.S. 444, 89 S. Ct. 1827 (1969). *See also Hess*, 414 U.S. 105, 94 S. Ct. 326 (1973) and *compare* Terminiello v. Chicago, 337 U.S. 1, 69 S. Ct. 894 (1949).

[64] 395 U.S. 444, 89 S. Ct. 1827 (1969).

[65] *See* Wis. Admin. Code § UWS 17.06(2) (1989).

[66] *Id.*

III. The Resulting Regulation

As the above discussion suggests, the rule that the working group developed and recommended to the Board of Regents was narrow in scope. It provides, in pertinent part:

> UWS 17.06 Offenses defined. The university may discipline a student in nonacademic matters in the following situations:
>
> . . .
>
> (2)(a) For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets, other expressive behavior or physical conduct intentionally:
>
> 1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
> 2. Create an intimidating, hostile or demeaning environment for education, university related work, or other university-authorized activity.
>
> (a) is present shall be determined by consideration of all relevant circumstances.[67]
>
> (b) Whether the intent required under par.

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[67] Wis. Admin. Code § UWS 17.06(2). The rule also sets forth specific examples of prohibited conduct, and conduct not prohibited, as follows:

> (c) In order to illustrate the types of conduct which this subsection is designed to cover, the following examples are set forth. These examples are not meant to illustrate the only situations or types of conduct intended to be covered.
>
> 1. A student would be in violation if:
>   a. He or she intentionally made demeaning remarks to an individual based on that person's ethnicity, such as name calling, racial slurs, or "jokes"; and
>   b. His or her purpose in uttering the remarks was to make the educational environment hostile for the person to whom the demeaning remark was addressed.
> 2. A student would be in violation if:
>   a. He or she intentionally placed visual or written material demeaning the race or sex of an individual in that person's university living quarters or work area; and
>   b. His or her purpose was to make the educational environment hostile for the person in whose quarters or work area the material was placed.
> 3. A student would be in violation if he or she seriously damaged or destroyed private property of any member of the university community or guest because of that person's race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age.
> 4. A student would not be in violation if, during a class discussion, he or she expressed a derogatory opinion concerning a racial or ethnic group. There is no violation, since the student's remark was addressed to the class as a whole, not to a specific individual. Moreover, on the facts as stated, there seems no evidence that the student's purpose was to create a hostile environment.

By focusing on the "fighting-words" principles in the context of the University's substantial interest in providing equality of educational opportunities and in preventing interference with education, the rule prohibits a narrow category of expressive conduct. It does not address a wide range of racist or otherwise discriminatory activity or offensive conduct occurring in group settings or in the public forums of the University. Similarly, it does not attempt to regulate the expression of ideas—even if derogatory to protected groups—in the classroom. It does not purport to reach student activities unrelated to the University's functions and work.[68] The working group and the Board of Regents tailored the Wisconsin regulation to be consistent with the first amendment, and chose to avoid the risks attendant on regulating more questionable areas.[69] The resulting rule prohibits only the most egregious kinds of discriminatory expressive behavior, and only when necessary to serve other compelling university and individual interests.

As of this writing, the constitutionality of the Wisconsin regulation has not been litigated. The only case challenging a discriminatory-harassment policy is *John Doe v. University of Michigan*,[70] holding Michigan's policy unconstitutional and enjoining its enforcement. There are, however, substantial differences between the Michigan policy and Wisconsin's regulation that make the application of the reasoning of the *Doe* decision to Wisconsin's regulation unlikely. The conduct prohibited by the Michigan policy included "any behavior, verbal or physical, that stigmatizes or victimizes an individual" and *either* involves a threat to an individual's academic efforts or personal safety, *or* has the purpose or effect of interfering with the individual's academic efforts, *or* creates a hostile environment.[71] Michigan applied this language to speech such as a classroom statement that a student believed homosexuality was a disease, and he intended to develop a counseling plan to make gay clients straight. The language of the Wisconsin rule is narrower, as indicated above, in terms of the conduct prohibited, the proof required to establish a violation, and the rule's application in the classroom setting. Accordingly, the court's rationale for finding the Michigan policy unconstitutional likely would not apply to the Wisconsin regulation.

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[68] *Compare, Discrimination and Discriminatory Harassment by Students in the University Environment*, policy of the University of Michigan (adopted April 15, 1988).

[69] Despite this cautious approach, the presentation of the working group's recommended rule to the Board of Regents at its March, 1989 meeting stirred considerable public controversy over the legality and propriety of the university's effort to regulate in this area. Because of its own concerns with the first-amendment implications of the recommended rule, the Board invited first amendment scholars from the University of Wisconsin Law School to discuss the pertinent constitutional issues. Following extensive debate and deliberation, the Regents directed further narrowing the working group's original draft to emphasize that, to be prohibited, discriminatory comments would have to be made both with the intent to demean *and* with the intent to create a hostile environment. With this and other minor changes, the Regents proceeded with the administrative rule-making process. In accordance with Wisconsin's administrative procedures act, the Board conducted a public hearing on the rule on June 8, 1939. The rule was then forwarded for review by the state legislature. Following a joint hearing by standing committees of each house, the legislative review period expired without objection being made to the rule. Because no objection was raised, the new rule was promulgated by the Regents and became effective September 1, 1989.

[70] 721 F. Supp. 852 (E.D. Mich. 1989).

[71] *See supra* note 68.

CONCLUSION

The University of Wisconsin System chose to regulate verbal and expressive discriminatory harassment in the context of specific problems and on the basis of substantial legal and policy interests. The University initiated its effort in response to particular incidents of harassing behavior that offended the entire University community. The regulation became part of a much broader attempt by the University to improve educational opportunities for minority groups throughout the System. The reasons for regulating harassment included the need to assure the rights of individuals to participate equally in the educational process, the desire to help the University fulfill its own policy commitments and legal obligations to provide equal access to education and to prevent discrimination, and the importance of preventing interference with the educational process and maintaining an orderly, hospitable campus environment for learning.

First-amendment concerns about regulating expressive activities, however, resulted in a narrow rule. Because the rule focuses on harassing speech specifically directed at individuals, with the intent to produce certain specific harmful results, it excludes a wide range of racist or otherwise discriminatory commentary uttered in group settings. The rule does not prohibit classroom expressions of opinions offensive to a protected group. It also does not preclude certain offensive discriminatory displays, or the distribution of racist or discriminatory literature in the public forums of the University. Ironically, the rule would not prohibit some of the racist incidents that led to its creation.

The relatively narrow ambit of the regulation was, however, justified by the need to adopt a rule which would withstand constitutional scrutiny, while expressing the University's commitment to principles of equality, tolerance and diversity in the University community, and its willingness to support those principles. Educational institutions, particularly colleges and universities, occupy a special place in our society. They function as incubators of learning and transmit social values. Regulating discriminatory harassment affirms the University's interest in the values of equality of opportunity and equal treatment of individuals in the University community, and establishes the University's leadership role in responding to a particularly difficult and troubling aspect of the discrimination confronting society.

Stopping Students from Cheating: Halting the Activities of Term-Paper Mills and Enforcing Disciplinary Sanctions Against Students Who Purchase Term Papers

Introduction

Over the last twenty years, a number of college[1] instructors have encountered the problem of students submitting term papers that they did not write. The proliferation of "term-paper mills"[2] exacerbated the problem because these companies offer custom-made or ready-written term papers to students for a fee,[3] promising confidentiality.[4] These companies advertise term papers in college newspapers and magazines aimed at college-aged readers. They also staple order blanks for term-paper catalogues to bulletin boards in college buildings, or hand out fliers to students on campuses.[5]

The sale of term papers to students enables them to obtain academic credit through fraud because students submit the work of term-paper mills as their own. To prevent the growth of this practice, in some jurisdictions, federal and state officials have sought to halt the activities of term-paper companies.[6] Federal officials, including the United States

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[1] Hereinafter, the term "college" will be used to denote both colleges and universities.

[2] Authors use the term "term-paper mill" to describe companies that mass produce term papers for sale to students. *See Schumer's Term Paper*, N.Y. Times, Aug. 13, 1987, at 22; Stanley N. Wellborn, *Cheating in College Becomes an Epidemic*, U.S. News & World Rep., Oct. 20, 1980, at 39.

[3] G. Jeannette Avent, *State Goes After Term-Paper Mill that Bought Ads in Daily Aztec; College: Attorney General Seeks Injunction Against Firm for Violating State Education Code*, L.A. Times, May 4, 1990, at 4.

Term-paper companies employ college graduates, free-lance writers and occasionally, faculty members to research and write on various topics. Often the free-lance writers are college graduates with some expertise in the subject involved in the requested paper topic. Some of the term papers are submitted honestly, and later sold to ghostwriters. Wellborn, *supra* note 2, at 39.

[4] For example, one California company will ship research papers in unmarked envelopes to insure confidentiality. D. Keith Mano, *The Cheating Industry: Companies That Sell Term Papers*. The National Review, June 5, 1987, at 50.

[5] Janet S. Pollak, *For Sale: Illiteracy on Campus*, N.Y. Times, Feb. 8, 1981, at 28.

[6] *See, e.g.*, United States v. International Term Papers, Inc. 477 F.2d 1277 (1st Cir. 1973); People v. Magee, 423 N.Y.S.2d 417 (N.Y. Sup. Ct. 1979), State v. Saksniit, N.Y.S.2d 343 (N.Y. Sup. Ct. 1972). All of these cases are discussed in the text of the Note. *See also infra* notes 75, 124, 128, and 130.

Postal Service ("USPS"), have relied on the federal mail-fraud statutes, and state officials have relied on state legislation to shut down the activities of term-paper mills.

Under the federal mail-fraud statutes,[7] one found using the mails in connection with a scheme to defraud may be both criminally and civilly liable.[8] The criminal mail-fraud statute provides that anyone who uses the mails to conduct a fraudulent scheme is subject to criminal penalties.[9] The civil mail-fraud statute permits the USPS to enjoin the mailing activities of persons found conducting such a scheme.[10] The First Circuit has found that advertising and selling term papers to students through the mails is a scheme to defraud colleges.[11]

In some states, providing custom research and writing for a fee violates either the state's education[12] or criminal code.[13] In California, for example, the state education code prohibits the marketing of prefabricated term papers for academic credit.[14] State officials could use this law to prohibit term-paper companies from advertising term papers in student newspapers or handing out fliers to students on campus. In New York, persons who prepare or sell term papers are liable for aiding and abetting students to fraudulently obtain either academic credit or a diploma.[15] Because many of the companies prepare term papers for direct submission to educational institutions, term-paper companies enable students to obtain false credit.

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[7] 39 U.S.C. § 3005 (1988) (civil mail-fraud statute); 18 U.S.C. § 1341 (1988) (criminal mail-fraud statute). *See also* Pereira v. United States, 347 U.S. 1, 74 S.Ct. 358 (1954) (mail fraud statute provides a jurisdictional base for federal law enforcement; its purpose is to prevent the Post Office from being used as an instrument of crime).

[8] See 39 U.S.C. § 3005 (1988); 18 U.S.C. § 1341 (1988).

[9] 18 U.S.C. § 1341 (1988) (whoever devises any scheme to defraud causes such matter or thing to be delivered by mail shall be fined not more than $1,000 or imprisoned not more than five years or both).

[10] 35 U.S.C. § 3005 (1988).

[11] *International Term Papers*, 477 F.2d 1277.

[12] For example, in Washington, it is illegal to prepare or sell term papers having reason to know the assignment is intended for submission under a student's name in fulfillment of a degree requirement. WASH. REV. CODE § 28B.10.584 (1990). *See also* COLO. REV. STAT. § 23-4-103 (1990) (trafficking in academic materials violates the state higher education and vocational training code); MD. EDUC. CODE ANN. § 26-201 (1989) (the sale of academic papers violates the education code); N.Y. EDUC. LAW § 213-b (Consol. 1990) (the unlawful sale of dissertations, theses and term papers violates the state education code).

[13] For example, in Maine, a person is guilty of criminal simulation if, in return for a pecuniary benefit, he or she prepares and sells a term paper knowing it will be submitted by another person in satisfaction of a course requirement. ME. REV. STAT. ANN. § tit v. 17-A 705 (West 1989). *See also* CONN. GEN. STAT. § 53-392b (1989) (preparation of assignments for students attending educational institutions prohibitted); FLA. STAT. § 877.17 (1989) (it is unlawful to sell dissertations, etc., to students); N.C. GEN. STAT. § 14-118.2 (1990) (it is unlawful to assist, etc., a student in obtaining academic credit by fraudulent means); NEV. REV. STAT. ANN. § 207.320 (Michie 1989) (it is illegal to prepare or sell academic writings); OR. REV. STAT. § 165.114 (1989) (sale of educational assignments prohibitted); 18 PA. CON. STAT. § 7324 (1988) (it is unlawful to sell dissertations, theses and term papers to students); VA. CODE ANN. § 18.2-505 (Michie 1990) (it is illegal to prepare, etc., papers to be submitted for academic credit).

[14] CAL. EDUC. CODE § 66400 (West 1991). *See also* Avent, *supra* note 3; Anthony Perry, *San Diego At Large; SDSU Want to Slice the Academic Baloney*, L.A. TIMES, Apr. 24, 1989, at 1.

Thus, college administrators may use both federal and state law to prevent persons from selling and/or purchasing prefabricated term papers. Part I of this Note discusses the regulation of term-paper mills under federal law. Part II examines state legislation that directly addresses their conduct, and Part III offers suggestions to college administrators to deal with students who buy term papers.

I. The Regulation of Term-Paper Companies Under Federal Law

Two federal statutes regulate the conduct of persons who use the mails in connection with a scheme to defraud: (1) the criminal mail-fraud statute makes it a federal offense to use the mails to devise or execute a scheme to defraud;[16] and (2) the civil mail-fraud statute authorizes the USPS to deny postal service to persons who use the mails for fraudulent purposes.[17] The government may use both statutes to prevent term-paper companies from selling papers to students who use them to defraud their colleges.[18]

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[15] N.Y. Educ. Law § 213-b (Consol. 1990); *see also*, People v. Magee, 423 N.Y.S.2d 417 (N.Y. Sup. Ct. 1979) (state may permanently enjoin defendant from selling materials designed and tailored for student cheating in the course of academic assingments); State v. Saksniit, 332 N.Y.S.2d 343 (N.Y. Sup. Ct. 1972) ("'ghost-writing' students' term papers is fraudulent, illegal, and . . . criminal'.").

[16] 18 U.S.C. § 1341 (1988). The criminal mail-fraud statute provides in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[17] 39 U.S.C. § 3005 (1988). The civil mail-fraud statute in pertinent part provides that upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by false representations, the Postal Service may issue an order which:

> (1) directs the Postmaster . . . to return such mail to the sender . . ., and
> (2) forbid the payment by a Postmaster to a person of any money order or postal note drawn to the order of such person and provides for the remittur of such sum.

See United States v. Outpost Development Corp., 369 F. Supp. 399 (C.D. Cal. 1973); Hollywood House International, Inc. v. Klassen, 508 F.2d 1276 (9th Cir. 1974) (civil statute permits the USPS to deny service to persons who use the mails to benefit from fraudulent schemes).

[18] *See International Term Papers*, 477 F.2d 1277.

A. *The Criminal Mail-Fraud Statute*

A court may find term-paper companies liable under the criminal mail-fraud statute for using the mails to send term papers to students for submission as course work. The two essential elements of criminal mail fraud are "(1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme."[19] In a number of mail-fraud cases, "a scheme to defraud" involved a company that marketed and sold products through the mails, but the products were not of the same quality as asserted in the advertisements.[20] In such instances, courts have found that the defendant directly defrauded its purchasers by misrepresenting the quality of its product.[21]

To be charged under the criminal mail-fraud statute for direct fraud, the defendant must also conduct a transaction in which the mails play an essential role.[22] "Essential" means that the mails are the primary means of communication between the buyer and the seller.[23] In *U.S. v. Sampson*,[24] the Supreme Court held that when the mails play a significant role in one's fraudulent conduct, they are used for the purpose of executing the scheme within the meaning of the criminal statute. In *Sampson*, the defendants had fraudulently represented that they would help businessmen obtain loans or sell their businesses. The defendants used the mail to send false acceptances to the victims which led the victims to believe that such services would be performed. The Court found the evidence established a deliberate and planned use of the mails to further a fraudulent scheme and held that the defendants were liable under the criminal mail-fraud statute.[25]

Courts, however, have not limited a scheme to defraud to cases of direct fraud. The Supreme Court has also found a scheme to defraud where the perpetrator of the fraud did not mail the item directly to the person defrauded.[26] In *United States v. Pereira*,[27] the defendant fraudulently obtained a check from the victim, then delivered the check to a bank which mailed the check to another bank for collection. Because the defendant indirectly used the mails to cash a check obtained through fraud, the Supreme Court held the defendant liable under the criminal mail-fraud statute. To result in criminal liability, the mailing need not be directed at the victim, it need only be a part of the fraudulent scheme.

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[19] 18 U.S.C. § 1341 (1988); *See also Pereira*, 347 U.S. 1, 74 S. Ct. 358 (see discussion in text).

[20] See, e.g., M.K.S. Enterprises, Inc. v. United States Postal Service, 459 F. Supp. (E.D.N.Y. 1978) (plaintiff contested postal injunction issued after plaintiff advertised two hair-care preparations through the mails); Hollywood House International, Inc. v. Klassen, 508 F.2d 1276 (9th Cir. 1974) (defendant convicted of mail fraud for using the mails to sell booklet on diet food); United States v. Halbert, 640 F.2d 1000 (9th Cir. 1981) (defendant convicted of mail fraud for marketing items commemorating the Nation's Bicentennial through the mails); United States v. Dowling, 739 F.2d 1445 (9th Cir. 1984) (defendant convicted of mail fraud for mailing catalogues of bootleg records and tapes).

[21] See cases collected in note 20.

[22] 18 U.S.C. 1341; *See also* United States v. Brewer, 528 F.2d 492, 495 (4th Cir. 1975) (operator of a cigarette mail order business convicted of criminal mail fraud for enabling customers to escape state taxes).

[23] *See, e.g., Brewer*, 528 F.2d 492.

[24] 371 U.S. 75, 83 S. Ct. 173 (1962).

[25] *Id.*

[26] *Pereira*, 347 U.S. 1, 74 S. Ct. 358.

[27] *Id.*

More closely related to term-paper cases, in *Alexander v. United States*,[28] the Eighth Circuit found that the mailing of a false medical certificate to a person who intended to commit fraud by posing as a licensed physician was an offense covered by the criminal mail-fraud statute. Furthermore, the court found that the defendant was not relieved of liability on the theory that the fraudulent enterprise was completed upon delivery of the false credentials. The court concluded that because fictitious medical licenses are not lawful subjects of commerce, the purpose of the scheme was not to effect a commercial transaction with the purchasers.[29] Instead, the defendants acted in conjunction with the purchasers to represent to the public that the purchasers were duly authorized to practice medicine.[30] Under the *Alexander* court's analysis, the criminal statute should apply to term-paper companies that send term papers to students who submit them as original work.

Although no court has done so to date, one may argue that the criminal mail-fraud statute should apply to the sale of term papers to students. First, term-paper companies conduct a scheme to defraud colleges. The scheme involves receiving money through the mails from students at educational institutions in exchange for term papers that students submit for credit. Second, the mails play an essential role in term-paper companies' business: term-paper companies send catalogues and term papers, and students return order forms and remit payment for these services through the mails.[31] Therefore, a court may subject term-paper companies to criminal penalties for conducting a scheme to defraud and using the mails for the purpose of executing the scheme. The civil mail-fraud statute, however, appears to provide the most effective means of stopping the sale of term papers to students.[32]

B. *The Civil Mail-Fraud Statute*

The civil mail-fraud statute authorizes the USPS to issue injunctions relating to the use of the mails "upon evidence satisfactory to [it] that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations . . ."[33] The statute delineates the procedures for the USPS to use in deciding whether a scheme to defraud exists and in assessing penalties when the mails are used to conduct such a scheme.[34] Upon a satisfactory showing of probable cause, the civil statute permits the USPS to issue an injunction to impound mail,[35] to return mail, or to forbid the payment of any money order or postal note.[36]

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[28] 95 F.2d 873 (8th Cir.), *cert. denied*, 305 U.S. 637, 59 S. Ct. 99 (1938).

[29] Alexander v. United States, 95 F.2d 873 (8th Cir. 1938), *cert. denied*, 305 U.S. 637, 59 S. Ct. 99 (1938).

[30] *Id.*

[31] *Brewer*, 528 F.2d 492, 496-97 (4th Cir. 1975) (defendant criminally liable if mails play an essential role in scheme to defraud).

[32] 39 U.S.C. § 3005. Section 3005 provides that the Postmaster General, after finding that a mailer is engaged in conducting a scheme for obtaining money by means of false representations, may stop the incoming mail of such persons and return it to the sender by issuing a stop order. *See* Lynch v. Blount, 330 F. Supp. 689 (S.D.N.Y. 1971). These provisions would enable the Postal Service to prevent term-paper companies from conducting a bulk of their business, and eventually would cripple their activities.

Under the civil-mail fraud statute, college administrators and government officials may enjoin the activities of term-paper companies. The Postal Service may find probable cause that term-paper companies are conducting a fraudulent scheme by looking at their advertisements and the nature of the product.[37] The fact that a student may request a custom-made paper and need only type his name at the bottom, indicates that the seller's purpose is to defraud the student's college.[38]

Like the criminal mail-fraud statute, the civil mail-fraud statute also applies to indirect misrepresentations.[39] The USPS may issue a postal injunction against one who sells materials through the mails to a second person who then uses the product to defraud a third party. The First Circuit, for instance, has suggested that an injunction might issue against a defendant who mailed fraudulent selling advice to sales representatives for use in calling on prospective buyers.[40] Such conduct defrauds the ultimate consumer, and falls within the ambit of the civil mail-fraud statute.

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[33] 39 U.S.C. § 3005(a) (1990). Section (a) states that upon evidence satisfactory to the Postal Service that any person is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations, the Postal Service may return mail or forbid the payment of any postal note or money order to the order of such person, and requires the person to desist from engaging in such scheme.

[34] *Id.*

[35] 39 U.S.C. § 3005(a). *See* M.K.S. Enterprises, Inc. v. United States Postal Service, 459 F. Supp. 1180 (E.D.N.Y. 1978) (court held that Postal Service's findings were false, and not supported by substantial evidence, therefore, the enforcement of a mail stop order was enjoined).

[36] 39 U.S.C. § 3005(a)(2); *see also* United States v. International Term Papers, Inc., 477 F.2d 1277, 1279 (1st Cir. 1973) (Postal Service may enjoin mailing activities of defendant who sells term papers to students under 39 U.S.C. § 3005); M.K.S. Enterprises, Inc. v. United States Postal Service, 459 F. Supp. (E.D.N.Y. 1978) (39 U.S.C. § 3005(a) authorizes the Postal Service to issue mail stop orders); Hollywood House International, Inc. v. Klassen, 508 F.2d 1276 (9th Cir. 1974) (39 U.S.C. § 3005 authorizes the Postal Service to take certain steps to deny those who engage in fraudulent advertising practices the use of the mails to further and benefit from their fraudulent schemes); United States v. Outpost Development Corp., 369 F. Supp. 399 (C.D. Cal. 1973) (citing the types of orders the Postal Service may issue under 39 U.S.C. § 3005 against persons who use the mails to conduct a scheme to defraud).

[37] *See, e.g.*, People v. Magee, 423 N.Y.S.2d 417 (N.Y. Sup. Ct. 1979) (the defendant's typewritten papers, in a format designed for direct submission as completed works in specific graduate or undergraduate courses, taken together with defendant's seductive sales literature, are full proof of unlawful intended use); State v. Saksniit, 332 N.Y.S.2d 343 (N.Y. Sup. Ct. 1972) (in light of the fact that court had before it many samples of the order forms filled out by the defendant's customers which asked for a "detailed desription of desired paper," the court granted a motion to enjoin the defendant's term-paper sales).

[38] Allan Tannarbaum, *"New and Improved:" Procedural Safeguards for Distinguishing Commercial From Noncommercial Speech*, 88 COLUM. L. REV. 1821, 1828 (1988).

[39] *See, e.g.*, *International Term Papers*, 477 F.2d 1279.

In 1973, the First Circuit upheld a postal injunction detaining the incoming mail of a company that sold academic papers to students for submission to colleges and other institutions as original work. In *United States v. International Term Papers, Inc.*,[41] the First Circuit analyzed two issues arising under provisions of the civil mail-fraud statute when applied to halt the mailing activities of a term-paper mill. First, the First Circuit addressed the issue of whether the defendant could still be liable even though he did not use the mails to communicate directly with the defrauded person.[42] The district court held that the civil statute did not apply to term-paper companies because the mails were not used to communicate directly with the persons to be defrauded.[43] The First Circuit disagreed, however, and found that the mailing need not be between the perpetrator and the victim, but rather that any mailing in connection with a scheme to defraud sufficed under the statute.[44] The critical requirement was that the scheme contemplated the receipt of money through the mail generated by means of false representations.[45] The court found the defendant enabled students to submit prefabricated work as their own by mailing materials to students in a format that suggests that the product is satisfactory to submit as orignal work. Thus, the defendant contemplated a scheme to defraud the third-party recipient of the materials. The court found that it was irrelevant that it was the buyer, not the seller, who makes the subsequent false representation; it is illegal for term-paper companies to receive money through the mail in return for assisting students in making fraudulent representations to their colleges.[46]

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[40] *See Id.* at 1280.

[41] 477 F.2d 1277 (1st Cir. 1973).

[42] See, e.g., Hollywood House International, Inc. v. Klassen, 508 F.2d 1276 (9th Cir. 1974) (defendant sold by mail a booklet for weight loss through a grapefruit diet); United States v. Outpost Development Corp., 369 F. Supp. 399 (C.D. Cal. 1973) (defendant advertised tonic for hair growth); United States v. Halbert, 640 F.2d 1000 (9th Cir. 1981) (defendant convicted of mail fraud for marketing items commemorating the Nation's Bicentennial through the mails); United States v. Dowling, 739 F.2d 1445 (9th Cir. 1984) (defendant sold by mail unauthorized records containing copyrighted material performed by Elvis Presley); United States v. Sampson, 371 U.S. 75, 83 S. Ct. 173 (1962) (defendants mailed literature fraudulently claiming they would help businessmen obtain loans); Lynch v. Blount, 330 F. Supp. 689 (S.D.N.Y. 1971) (defendant mailed advertisement for a formula that could "drain off" fat).

[43] United States v. International Term Papers, 351 F. Supp. 76 (D. Mass. 1972).

[44] 477 F.2d 1277.

[45] *Id.* at 1279.

[46] *Id.* The court said that it is irrelevant that the buyer, not the seller, makes the

Second, the First Circuit addressed the issue of whether the USPS could enjoin the sale of legal products through the mails. The *International Term Papers* court found that the transaction itself need not be illegal to permit an injunction.[47] The court concluded that the Postal Service may enjoin term-paper companies because students submitted the materials verbatim for credit, and it is illegal to provide students with the means to receive credit or a degree in a fraudulent manner.[48]

The Fourth Circuit also has ruled that the the fraudulent conduct need not itself be illegal to permit a postal injunction.[49] In *United States v. Brewer*,[50] the Fourth Circuit found that the mail-fraud statutes protect the public against all kinds of fraudulent conduct, whether illegal or not. The *Brewer* court said that using the mails for the interstate sale of lawful merchandise is in itself an innocent act, but it becomes fraudulent when the seller couples it with an intent to transact business in a way that enables its customers to commit fraud.[51] In *Brewer*, the defendant set up a business in North Carolina and solicited orders and delivered cigarettes to Florida residents through the mails.[52] The defendant failed to file her name and address with Florida tax officials, so she was charged with using the mails to transact business in a way that allowed Florida residents to escape taxes. The court held that the evidence established that the defendant devised a scheme to defraud and had used the mails for the purpose of executing the scheme.[53]

Thus, in *Brewer*, the seller was not defrauding her customers, but rather state tax officials. Under the *Brewer* analysis, the federal government may enjoin the sale of otherwise legal research papers to students who submit the papers as their own. As in *Brewer*, term-paper companies are not directly defrauding their purchasers, but rather college professors and administrators, and are using the mails to transact business in a way that allows students to obtain fraudulent credit.

II. STATE TERM-PAPER LEGISLATION

In an effort to crack down on cheating,[54] a handful of states have enacted legislation to deal with the proliferation of term-paper com-

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false representation. "The reality is that the [company] receives money through the mail by means of assisting students to make false representations to universities." *Id.*

[47] *Id.*

[48] *Id.*

[49] United States v. Brewer, 528 F.2d 492 (4th Cir. 1975).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] See Wellborn, *supra* note 21, at 39; *It's Not Only West Point That Has Cheating Problems*, U.S. NEWS & WORLD REP., Jun. 14, 1976, at 35.

panies.[55] Some states specifically outlaw campus ghostwriting for a profit,[56] while others prohibit the marketing, preparing, or selling of prefabricated term papers.[57] Although states have rarely enforced these laws, colleges should consider state law in their quest to curb the use of prefabricated term papers.

Most state statutes require that the seller know or have reason to know that the work is intended to be submitted for credit.[58] To circumvent these intent provisions, term-paper companies will claim that they are providing legitimate research services and that they do not know that students directly submit the papers for credit. The issue then becomes whether states can hold these companies responsible for the ultimate actions of students. Unlike the federal mail-fraud statute, in which providing the means to obtain fraudulent credit is sufficient to implicate the statute, states usually require a more direct nexus between the seller's activities and an intent to defraud.[59] As this Note will indicate, the seller's knowledge of students' fraudulent intent may be inferred from the advertising and sales activities of term-paper companies. Close examination of the business activities of term-paper mills indicate their knowledge of students' intent to use these papers to obtain fraudulent credit.

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[55] Colo. Rev. Stat. § 23-4-103 (1990); Conn. Gen. Stat. § 53-392b (1989); Fla. Stat. § 877.17 (1989); 17-A Me. Rev. Stat. Ann. § 705 (1989); Md. Educ. Code Ann. § 26-201 (Michie 1989); N.J. Stat. Ann. § 2A:170-77.16 (1989); N.Y. Educ. Law § 213-b (Consol. 1990); N.C. Gen. Stat. § 14-118.2; Or. Rev. Stat. § 165.114 (1989); 18 Pa. Cons. Stat. § 7324 (1988); Nev. Rev. Stat. Ann. § 207.320 (Michie 1989); Va. Code Ann. § 18.2-505 (Michie 1990); Wash. Rev. Code § 28B.10.584 (1990).

[56] *See* Md. Educ. Code Ann. § 26-201 (1989) (a person may not sell or offer for sale any academic paper); 18 Pa. Cons. Stat. § 7324 (1988) (no person shall sell or offer for sale any assistance in the preparation of a dissertation, term paper or thesis). *See also Straight A's at $3.50 a Page; New York Cracks Down on Ghostwritten College Papers*, Time, Jan. 26, 1981, at 79.

[57] Colo. Rev. Stat. § 23-4-103 (1990) (no person shall prepare or offer to prepare any term paper); Conn. Gen. Stat. § 53-392b (1989) (no person shall prepare a term paper for submission by another); Fla. Stat. § 877.17 (1989) (it is unlawful to sell or offer to sell any term paper); 17-A Me. Rev. Stat. Ann. § 705 (1989) (a person is guilty of criminal simulation if he prepares a term paper to be submitted by another person in satisfaction of a credit or degree requirement at an educational institution); N.J. Stat. Ann. § 2A:170-77.16 (1989) (no person shall prepare a term paper for submission under a student's name in fulfillment of a degree requirement); N.Y. Educ. Law § 213-b (Consol. 1990) (no person shall prepare any written material intended for submission as a term paper by a student at an educational institution); N.C. Gen. Stat. § 14-118.2 (it is unlawful to offer to assist any student to obtain academic credit by fraudulent means, including preparing a term paper); Or. Rev. Stat. § 165.114 (1989) (no person shall sell or offer to sell an assignment to another person for submission in fulfillment of a degree requirement); Nev. Rev. Stat. Ann. § 207.320 (Michie 1989) (any person who prepares a term paper to be submitted as the work of one not the writer is guilty of a misdemeanor); Va. Code Ann. § 18.2-505 (Michie 1990) (no person shall prepare any term paper to be submitted by another person for academic credit); Wash. Rev. Code § 28B.10.584 (1990) (no person shall prepare an assignment for a student for direct submission in fulfillment of a degree requirement).

[58] Colo. Rev. Stat. § 23-4-103 (1990) (no person shall prepare or offer to prepare any term paper with the knowledge, or under the circumstances which he should reasonably have known, it is to be sum-bitted by another for academic credit); Conn. Gen. Stat. § 53-392b (1989) (no person shall prepare a term paper knowing or under the circumstances having reason to know it is for submission by another); Fla. Stat. § 877.17 (1989) (it is unlawful to sell or offer to sell any term paper which the seller knows or reasonably should have known as intended for submission by a student in fulfillment of degree requirements); 17-A Me. Rev. Stat. Ann. § 705 (1989) (a person is guilty of criminal simulation if he prepares a term paper knowing that it will be, or believing that it probably will be submitted by another person in satisfaction of a credit or degree requirement at an educational institution); Md. Educ. Code Ann. § 26-201 (1989) (a person may not sell or offer for sale any academic paper if he knows that the buyer intends to submit the academic paper to an educational institution); N.J. Stat. Ann. § 2A:170-77.16 (1989) (no person shall prepare a term paper knowing, or under the circumstances having reason to know, it is for submission under a student's name

A. *Provisions of State Term-Paper Legislation*

State statutes generally cover two issues: (1) the marketing of any form of assistance to obtain credit by fraudulent means;[60] and (2) the offering or sale of prefabricated term papers to students who submit them in fulfillment of degree requirements at an educational institution.[61] In states without term-paper legislation, proposals have come

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in fulfillment of a degree requirement); N.Y. EDUC. LAW § 213-b (Consol. 1990) (no person shall prepare any written material which the seller knows, is informed, or has reason to believe is intended for submission as a term paper by a student at an educational institution); OR. REV. STAT. § 165.114 (1989) (no person shall sell or offer to sell an assignment to another person knowing, or under the circumstances having reason to know, it is for submission in fulfillment of a degree requirement); 18 PA. CONS. STAT. § 7324 (1988) (no person shall sell or offer for sale any assistance knowing, or under the circumstances having reason to know, it is in preparation of a dissertation, term paper or thesis); VA. CODE ANN. § 18.2-505 (Michie 1990) (no person shall prepare any term paper to be submitted by another person for academic credit); WASH. REV. CODE § 28B.10.584 (1990) (no person shall prepare an assignment for a student knowing or under the circumstances having reason to know it is for direct submission in fulfillment of a degree requirement).

[59] *See infra* note 62. In their statutes, states seem to require that the sellers know, or have reason to know, that the students planned to directly submit the purchased term papers to educational institutions. Thus, not only must the term papers supply the means for defrauding the colleges, they must also know that their products are ultimately used to defraud colleges. As this Note will explain, states may easily point to certain evidence which demonstrates their knowledge of students use of their products.

[60] COLO. REV. STAT. § 23-4-103 (1990) (no person shall make or disseminate, with an intent to induce any other person to purchase, any statement that he will prepare any term paper); FLA. STAT. § 877.17 (1989) (it is unlawful to sell, offer to sell, or advertise for sale, any term paper); N.C. GEN. STAT. § 14-118.2 (it is unlawful to offer to assist any student, or advertise to assist any student to obtain academic credit by fraudulent means, including preparing a term paper).

[61] *See, e.g.*, CONN. GEN. STAT. § 53-392b (1989) (no person shall prepare or offer to prepare a term paper for submission by another); FLA. STAT. § 877.17 (1989) (it is unlawful to sell, offer to sell, or advertise any term paper); MD. EDUC. CODE ANN. § 26-201 (1989) (a person may not sell or offer for sale any assistance in the preparation of

before their state legislatures to inhibit the sale of term papers. In Idaho, for example, the senate endorsed a bill to curb the activities of out-of-state companies that sell term papers to Idaho college students.[62] The legislation would eliminate bulletin-board advertising by firms marketing term papers on Idaho college campuses.[63] In Oregon, a measure was proposed which would make it a crime to sell "ghost-written" term papers.[64] The bill would make it illegal to sell or offer to sell a complete term paper or other assignment knowing that the buyer planned to submit the paper under his or her name in a college class.[65] Both of these proposals contain provisions which are typical of other states' term-paper legislation.[66] Despite the existence of these statutes, state officials have not applied or enforced them on a wide scale. Only New York has prosecuted term-paper companies on the state level.[67]

B. *Application of State Law*

In 1979, New York's Attorney General sought to enjoin the activities of a company selling written materials designed as custom research for students in college- and graduate-level courses.[68] The court held that the defendant's typewritten papers, in a format designed for direct submission, taken together with the defendant's seductive sales literature, were proof of an unlawful intended use.[69] The state court upheld an injunction banning sales of the defendant's products.[70]

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an academic paper); N.Y. Educ. Law § 213-b (Consol. 1990) (no person shall prepare, or offer to prepare, any written material intended for submission as a term paper by a student at an educational institution); N.C. Gen. Stat. § 14-118.2 (1990) (this subsection prohibits the preparing, or offering to prepare any term paper); Or. Rev. Stat. § 165.114 (1989) (no person shall sell or offer to sell an assignment to another person for submission in fulfillment of a degree requirement); 18 Pa. Cons. Stat. § 7324 (1988) (no person shall sell or offer for sale to any student enrolled in a university the writing of a term paper); Wash. Rev. Code § 28B.10.584 (1990) (no person shall prepare, or offer to prepare, an assignment for a student for direct submission in fulfillment of a degree requirement).

[62] UPI, Feb. 22, 1982, *available in* LEXIS, Nexis Library, Wires File.

[63] *Id.*

[64] *Id.* The bill, patterned after a Massachusetts statute, would carry a maximum six-month jail term and a $500 fine for each conviction.

[65] UPI, Jul. 21, 1981, *available in* LEXIS, Nexis Library, Wires File. A first offense would carry a fine of up to $1,000 and subsequent violations could result in penalties of up to $10,000.

[66] *See supra* notes 55-57.

[67] *See* People v. Magee, 423 N.Y.S.2d 417 (N.Y. Sup. Ct. 1979); State v. Saksniit, 332 N.Y.S.2d 343 (N.Y. Sup. Ct. 1972).

[68] *Magee*, 423 N.Y.S.2d at 417.

[69] *Id.* at 419, n.1. In *Magee*, the warning on the catalogue stated: "Our company operates as a publisher of educational source material. It is not, and never has been, a writer of term papers or other academic work. The material we provide is intended to provide the reader with background and source material on a given topic, and not as a substitute for the reader's own original research and writing. We do not support or condone plagiarism or academic fraud of any nature."

[70] *Id.*

State prosecutors may enjoin the activities of term-paper mills by charging these companies with aiding and abetting students to obtain degrees through fraud. In *State v. Saksniit*,[71] New York's Attorney General sought to dissolve the defendant's corporation for selling term papers to students.[72] The New York Supreme Court held in favor of the state, finding the defendant's papers were designed explicitly to deceive colleges and "would have no other value in the world of scholarship."[73] The court found that the defendant carefully tailored the papers to suit the assignments in specific college courses, and sold them for that purpose.[74] The court held that because the defendant sold these term papers to students with reason to believe that the students intended to submit them as their own work, the defendant aided and abetted students to obtain their diplomas by "fraudulent means" in violation of the state education code.[75]

C. *Attempts to Avoid the Statutory Provisions*

Term-paper mills attempt to circumvent state laws prohibitting the sale of research to students by claiming that they are unaware of students' intended use of the materials. In other words, they assert that they do not intend for students to use the papers for direct submission to colleges. To buttress this claim, many companies will use disclaimers stating that the student is to use the materials only for research or reference purposes, and not for submission for academic credit.[76]

To prove their lack of knowledge of a student's fraudulent intent, term-paper mills also place warnings on their catalogues[77] or have students sign conditions of sale agreements.[78] New York courts, however, are mindful of this practice and have not given waivers much weight in deciding term-paper cases. In *State v. Magee*,[79] the New York Supreme Court found that the defendant "was not saved by his pious disavowals of plagiaristic intent which the buyers ritualistically sign."[80] The court called this procedure "patently tongue-in-cheek, and executed with an obvious wink."[81] Thus, attempts to circumvent the intent provisions of the statute by formal waiver may prove unsuccessful.

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[71] 332 N.Y.S.2d at 345.

[72] *Id.* The complaint sought dissolution of the corporation on the ground that the business activities of the defendants had the direct capacity and tendency of subverting the process of learning and encouraging intellectual dishonesty and cheating, and were, therefore, contrary to the public policy of the State in maintaining and preserving the integrity of the educational process.

[73] *Id.* at 347.

[74] *Id.* The court found that each student filled out a form which requested the name of the professor and the course; the form also provided a large blank space in which the student was requested to state the number of pages and to give a detailed description of desired paper, and to list references the company was to use in preparing the term paper.

[75] *Id.* at 346.

[76] *See, e.g.*, *Saksniit*, where the bottom of the defendant's advertising flier stated: "This material is intended to be used for research and reference purposes only." 332 N.Y.S.2d at 344.

[77] *See Magee*, 423 N.Y.S.2d at 419. The warning on the catalogue stated: "Our Company operates as a publisher and distributor of educational source material. It is not, and never has been, a writer of term papers or other academic work. The material we provide is intended to provide the reader with background and source material on a given topic, and not as a substitute for the reader's own original research and writing. We do not support or condone plagiarism or academic fraud of any kind."

[78] 423 N.Y.S.2d at 419. The conditions of sale stated: "I further agree and warrant

Most state statutes provide that term-paper companies must know or have reason to know that the materials are intended for submission for credit in order to be liable.[82] State officials may find it difficult to prove the seller's knowledge or intent to deceive, but courts and legislators have tried to close the intent loophole found in these statutes. For example, in New Jersey, it is illegal to sell term papers to a client who gives the term-paper company the impression that he or she intends to submit the products for credit to an educational institution.[83] In New Jersey, prosecutors may prove that a student gave a company this impression when he or she filled out a detailed order form requesting a specific research topic and bibliographic references.

The factors pointed out in *Saksniit* may guide other state officals wishing to demonstrate term-paper mills' intent to sell prefabricated term papers to students.[84] First, the court looked at the company's advertising campaign, and found that the wording of its advertisements made clear the seller's intent to sell customized research. The advertisement not only emphasized the amount of work and number of deadlines that students face,[85] but it also stated that the product was of sufficient quality for submission to any program at an accredited university.[86] The company's advertising fliers boasted that the company

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that I shall not plagiarize or submit all, or any part of said material as my own in fulfillment of the requirements for a degree, diploma, certificate, courses of study, nor permit any other person or persons to do so."

[79] 423 N.Y.S.2d 417.

[80] *Id.*

[81] *Id.*

[82] *See supra* note 58. California's code prohibits the marketing of research assistance-type services if the vendor "should reasonably have known, that such term paper, thesis, dissertation or other written material is to be submitted by any other person for academic credit." CAL. EDUC. CODE § 66400 (West 1991). *See also* Avent, *supra* note 3.

[83] N.J. STAT. ANN. § 2A:170-77.16 (1989) (no person shall, for any fee, prepare, offer to prepare any term paper knowing or under the circumstances having reason to know that the paper is intended for submission under a student's name to an educational institution).

[84] *Saksniit*, 332 N.Y.S.2d 343. The factors the court examined were the defendant's clientele, advertising and business activities.

[85] *Id.* at 345. The defendant's advertising circular stated: "Do you have a term paper assignment that's a little too much work? Are you cramped for time with a nightmarish deadline closing in? Let us help you."

[86] *Id.* at 348. The defendant's employees signed a contract with the defendant promising "to submit research and writing that is commencerate [sic] in quality with work sufficient to be accepted in a Graduate Program at an accredited University."

had independent, professional writers capable of writing on any subject.[87] Thus, the court held the company was providing custom-made papers to students to submit directly as course work, and, therefore, the defendant had reason to know the work would be submitted for credit.[88]

Second, the *Saksniit* court noted that the students filled out order blanks detailing the subject matter and page lengths of the desired paper, which should have demonstrated to the seller the student's fraudulent intent.[89] The court found it was obvious that the student planned to "palm off the term paper he receives from the [company] as his own."[90] The company also requested that the students list their college and course name so that no two students submitted the same paper.[91] When taken together, these factors weakened any argument that the company was unaware of students' intent to submit the works as their own.[92]

D. *Challenges to the State Laws*

Term-paper companies claim to operate legitimate businesses providing bibliographical services for researchers. They therefore claim that they should be allowed to advertise, and are not responsible for student misuse of their services.[93]

Term-paper companies have challenged certain state statutes on the grounds that restriction of their advertising activities is tantamount to censorship and violates the First Amendment.[94] In *Magee*, the defendant argued that while the education law prohibited the rendering of assistance for hire, the products provided were not "assistance" but publications entitled to First-Amendment protection.[95] The court found this argument "specious" because the term papers were carefully designed for submission as undergraduate work.[96] In state cases, as in federal cases, the fact that the papers sold by the defendant could conceivably be put to lawful use does not make the statute interdicting them unconstitutional.[97] The courts have established that the first amendment does not protect a scheme to defraud.[98] Thus, state law provides a workable means of halting the activities of term-paper mills. Unfortunately, state officials have not enforced state law on a wide scale.

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[87] *Id.* at 345. The defendant's flier stated: "We have professional writers who can handle any subject. Our papers are custom made, and professionally typed. We offer the most economical work anywhere, at no sacrifice in quality or service to you."

[88] *Id.* at 345.

[89] *Id.* at 348.

[90] *Id.*

[91] *Id.* The students received a form to fill out which requested the name of the school, course and instructor.

[92] *Id.* at 348-49.

[93] *See* Avent, *supra* note 3. Term-paper companies argue that their papers bear the same status as an encyclopedia article or bibliography. They view themselves as information brokers, a legitimate business, and feel they should be allowed to advertise.

[94] *See* Pollak, *supra* note 5, at 28. In California, one company, Research Assistance, based in Los Angeles, argued that their "autonomy is protected by the Constitution, and what students do with the research is up to them, morality is an individual choice." *See also* Bob Sipchen, *The Campus Ghostwriter; For Ten Years He Has Been the Brains Behind Some of the Best-Selling Custom Research Papers*, L.A. TIMES, Mar. 1, 1989, at 1.

[95] 423 N.Y.S.2d at 419.

III. Suggestions for College Administrators

Due to the limited enforcement of state law, college administrators may have to take it upon themselves to curb the use of prefabricated term papers. Although educators cannot know how many students purchase course work, they can implement methods to catch those who do.[99] Colleges must take action against companies that sell the term papers and discipline students who submit them for credit.

A. *Regulating Advertising Activities*

The main issue facing college administrators is how to thwart the advertising efforts of term-paper mills on campus. Colleges must undertake to halt the direct marketing of term papers to students by limiting distribution of advertisements, removing order blanks from bulletin boards, and prohibiting term-paper advertisements in the college newspaper.[100] In some states, colleges wishing to censor term-paper advertisements in student newspapers may invoke provisions of state laws which prohibit the marketing of course work for sale.[101] In 1974, Boston University sought an injunction to forbid term-paper companies from coming on campus to advertise the sale of research papers.[102] A court will issue an injunction if the college can show that publication of the forbidden materials would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[103]

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[96] *Id.*

[97] *Id.*

[98] *See* Lynch v. Blount, 330 F. Supp. 689 (S.D.N.Y. 1971), *aff'd*, 404 U.S. 1007, 92 S. Ct. 673 (1972).

[99] *See* Sipchen, *supra* note 94.

[100] *Id.* The Attorney General of California filed suit against a Los Angeles company that advertised term-paper-writing services for a fee in the San Diego State University student newspaper. *See also* Colman McCarthy, *NOW, Wait Just a Minute*, Wash. Post, Nov. 26, 1989, at F2. (Georgetown refuses to accept advertisements from companies that sell term papers).

[101] *See* Perry, *supra* note 14, at 1.

[102] *It's Not Only West Point That Has Cheating Problems*, U.S. News & World Rep., June 14, 1976, at 35.

[103] Fraser v. Bethel School District, 755 F.2d 1356 (9th Cir. 1985) (school charged student with violating the school's disruptive code during a speech at a student-run assembly in which he used sexual innuendo).

Student newspapers may resist pressure from administrators to withhold term-paper advertisements if they think First-Amendment rights are at stake.[104] Although some firms no longer wish to advertise in college papers due to the controversy,[105] independent student newspapers most likely will continue to accept advertisements for any legal products or services.[106] A group of California students responding to the withdrawal of term-paper advertisements from their newspaper pointed out that, although alcohol is detrimental to students, some college newspapers do not prohibit alcohol advertisements.[107]

Students may also argue that colleges may not ban the advertising of legal products. But although the sale of term papers is legal, courts have held that administrators may prohibit the advertising of certain legal products. For example, the Fourth Circuit held that administrators may ban the distribution of a high school newspaper containing an advertisement promoting the sale of drug paraphernalia because it encouraged an activity that endangered the health or safety of students.[108] College officials could argue that although term papers are legal, the sale of these papers to students encourages them to cheat and defraud their colleges.

B. *Halting Term-Paper Companies Under State Law*

After consulting the Attorney General or the United States Attorney's office in their state, college administrators may seek to enter into a consent agreement with term-paper mills to stop the sale of term papers to students. For example, in New Jersey, a United States Attorney arranged a binding consent agreement between a term-paper mill and New Jersey educators whereby the companies were allowed to operate freely if they agreed not to advertise on campus, agreed to stamp each page of each paper with a disclaimer[109] and, under certain conditions, to report names of students who used their services.[110]

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[104] This may be true especially in light of the fact that many student newspapers continue to advertise rolling papers, x-rated movies, alcohol, phone sex and abortion. *See* Perry, *supra* note 14, at 1. *See also* Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562 (1988) (student group argued that administrators violated their rights when they seized and prevented the distribution of a sex information supplement in a school newspaper).

[105] *See* McCarthy, *supra* note 100. According to the National Organization of College Newspaper Business and Advertising Managers, most college newspapers do not accept advertisements from term-paper companies, although the organization has no overall policy.

[106] Avent, *supra* note 3. California's Attorney General filed suit against a Los Angeles company that advertised term-paper-writing services for a fee in the San Diego State University newspaper (the Daily Aztec). The suit sought a court injunction to bar the firm from selling term papers for academic credit because in California, offering custom research and research papers for sale violates the state education code. The company named in the suit is no longer advertising its services in the Daily Aztec, but the paper's editorial board confirmed the paper's policy to continue accepting any advertisement for legal products or services. A member of the editorial board also stated that if the courts determine it is illegal to offer research services, the paper no longer will run the advertisements.

[107] *Id.*

[108] Williams v. Spencer, 622 F.2d 747 (4th Cir. 1980) (principal may ban the distribution of a school newspaper which contained an advertisement promoting the sale of drug paraphernalia).

As an alternative, administrators may seek to prevent students from purchasing term papers by exposing the companies that are selling them. Some state officials have resorted to very creative tactics. In California, for example, the Attorney General conducted an undercover sting investigation with San Diego State University's public-safety department in which officials posed as clients and arranged to buy custom-made term papers.[111] During the sting operation, the Attorney General's office had the firm complete at least one paper for investigators with the knowledge that the paper was to be submitted by the buyer for academic credit at San Diego State.[112] The Attorney General obtained an injunction to stop the sales of term papers to students.[113]

In New York, officials conducted a similar sting operation after a college instructor complained to the Attorney General's office that a student confessed to having bought a custom-made term paper from a term-paper company.[114] An investigator for the Attorney General's office posed as a student to obtain the services of the corporation. New York's Attorney General obtained an injunction to dissolve the operations of the company.[115]

In New Jersey, an investigator from the Hudson County prosecutor's office went to the offices of a term-paper mill and requested a fifteen-page research paper. The investigator asked for a double-spaced, typewritten report on nuclear arms control and received a term paper for $225.[116] Another investigator bought two term papers the company had on file for $70. In the resulting prosecution, the investigator testified the report was ready-made with a blank space where a student merely had to insert his or her name. The New Jersey State Court found the defendant sold the papers to the investigators knowing they would be handed in under their own names.[117]

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[109] This would merely force many students to retype the paper.

[110] See Pollak, *supra* note 5.

[111] Larry Gordon, *Court Writes End to Term-Paper Mill*, L.A. TIMES, Feb. 17, 1989, Part 1, at 3. In California, a professor posed as a returning student and arranged to pay for a custom made term paper. In addition, the Attorney General and the University's Public Safety Office conducted an undercover sting operation at California State University.

See also Straight A's at $3.50 a Page; New York Cracks Down on Ghostwritten College Papers, TIME, Jan. 26, 1981, at 74. In 1981, New York's Attorney General conducted a raid to smash a ring of ghostwriters who were selling term papers to college students. Undercover agents posing as clients, raided the premises of a term-paper company, impounding two truckloads of evidence. Also in New York, a member of the House of Representatives had one of his aides buy a paper from a term-paper mill. *Schumer's Term-Paper*, N.Y. TIMES, Aug. 13, 1987, at A 22.

[112] See Pollak, *supra* note 5.

[113] *Id.*

[114] See Minuteman Research, Inc. v. Lefkowitz, 329 N.Y.S.2d 969, (N.Y. Sup. Ct. 1972).

[115] *Id.*

[116] Matthew Reilly, UPI, Aug. 5, 1985, *available in* LEXIS, Nexis Library, Wires File.

As a result of the evidence officials gathered in each instance, state officials were able to obtain injunctions against sales of term papers. Despite the success of sting operations, they may not be practical in all instances. They involve great expense, and present coordination problems among educators and state officials. Educators may have to forego confronting the sellers and instead concentrate on deterring the purchasers of prefabricated term papers.

C. *Determinining Which Students Purchase Term Papers*

In pursuing students, colleges have a number of options to determine which students are involved in term-paper schemes. First, colleges may try to obtain client lists from term-paper companies,[118] but success will vary from state to state. In California, California State University officials obtained the names of students who purchased term papers following a sting investigation of a Los Angeles-based company.[119] In New Jersey, a federal court required term-paper mills to maintain lists of the papers they sold, the people who bought them,[120] and furnish the lists to colleges upon request.[121] In Massachusetts, a Seattle-based firm agreed in federal court to surrender its client list of students that purchased papers through the mails.[122]

Administrators may still face obstacles, however, in attempting to obtain student names. At Rutgers University, for instance, in 1980, an assistant dean wanted to supply one company with a list of students, then have the company confirm if any of the students had bought a paper. A United States Attorney said the burden of proof was on the college to prove that a good reason existed to suspect a particular student in order to protect the privacy rights of those who use the companies' services legitimately.[123]

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[117] *Id.* John Magee, owner of Collegiate Research Systems, was fined $2,000 for selling the term papers and a permanent injunction was issued against selling them in the future.

[118] *See* Pollak, *supra* note 5. Pollak noted that liquor stores are not required to maintain lists of collegians who legally purchase their wares, even though alcohol may be misused.

[119] *Supra* note 106.

[120] *See* Pollak, *supra* note 5.

[121] *Id.*

[122] UPI, Oct. 18, 1981, *available in* LEXIS, Nexis Library, Wires File. Boston University was a leader among Boston colleges that worked with United States Postal Service prosecutors to seek an injunction forcing the provision of customer lists. The sale of term papers has been illegal in Boston since Boston University obtained an injunction against them in October, 1972, but the practice has continued through notices on campus bulletin boards and advertisements in "alternative" newspapers.

[123] *See Term-Paper Ghosts Still Haunt the College Scene*, N.Y. Times, Nov. 16, 1980, 12, at 21.

Another option for administrators is to buy term-paper catalogues and notify instructors to check the catalogue if a paper looks suspicious.[124] If a professor suspects that a paper is prefabricated, the college may even go as far as purchasing the catalogue paper it seems to resemble.[125] Administrators could distribute catalogues of research paper companies to their faculty with instructions to assign papers on narrow topics not found in the catalogues.[126] Still, these suggestions impose a large burden on college administrators and professors. Perhaps the best solution is to deter students from purchasing term papers by promising harsh disciplinary sanctions for those who are caught.

D. *Disciplining Students Who Purchase Term Papers*

One of the ways administrators can inhibit student use of prefabricated term papers is to insure that students know that administrators will not tolerate plagiarism. One suggestion is to distribute a handbook to students specifying the college's disciplinary policy on plagiarism.[127] The handbook should explicitly define "plagiarism;" a good example is Princeton University's handbook, which defines plagiarism as "the deliberate use of any outside source without proper acknowledgement. 'Outside source' means any work, published or unpublished, by any person other than the student."[128] This would cover prefabricated term papers. Furthermore, if the student's intent, or lack thereof, to deceive the reader is irrelevant,[129] the college's "code" would parallel state antiplagiarism statutes which make the use of prefabricated material an infraction, regardless of an intent to defraud.

Colleges also have a number of choices in assessing penalties for plagiarism. At most colleges, professors will fail students caught submitting ghost-written work.[130] Courts have recognized that universities have the authority to revoke or refuse a degree; or to drop a student from a program.[131] A college may note the infraction on the student's transcript through using special grades which would alert potential employers and graduate schools.[132] Thus, college administrators may either enforce state law on their campuses, or implement their own policies to deal with students who submit others' work as their own.[133]

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[124] Sipchen, *supra* note 94. A former dean of students at U.C.L.A. buys term-paper catalogues every year and notifies all instructors to check in his office if a paper looks suspiciously similar to papers offered for sale in the catalogues.

[125] *Id.*

[126] See Sipchen *supra* note 94. An assistant dean at Rutgers went so far as to distribute catalogues of off-campus research-paper companies to his faculty, with instructions to assign papers on narrow topics not found in the catalogues.

[127] See, e.g., Napolitano v. Trustees of Princeton Univ., 453 A.2d 263 (N.J. 1982) (court reprinted Princeton University's rules and procedure for its code of discipline).

[128] *Id.* The court found that even if the student has consulted an essay or body of notes from another student, he or she should state that fact and indicate clearly the nature and extent of his or her obligation: the name and class of the author of an essay or notes which are consulted should be given, and the student should be prepared to show the work to the instructor. *Napolitano*, 453 A.2d at 267. *See also*, *Why Do We Tolerate the Unoriginal?*, CHI. TRIB., Oct. 10, 1987.

[129] *Napolitano*, 453 A.2d at 266. The court said "please note that, while not all academic infractions involve fraud, all are violations of the University's standards and will normally result in disciplinary penalties."

[130] See *Straight A's at $3.50 a Page; New York Cracks Down on Ghostwritten College Papers*, TIME, Jan. 26, 1981, at 74.

CONCLUSION

The business that term-paper companies conduct is not only morally wrong, and contrary to public policy, but it is prohibited under federal and state law. The federal government may enjoin their activities when they involve the use of the mails for fraudulent purposes. States may enjoin the sale of term papers which violates education or criminal codes. State prosecutors have the option to enjoin term-paper mills' activities under the federal mail-fraud statute or under state statutes prohibiting the marketing and sale of term papers. Thus, when term-paper companies couple their use of the mails with an intent to enable customers to commit fraud, this constitutes not only a federal offense, but a violation of certain state statutes as well.[134]

Although state and federal legislation prohibits the activities of term-paper companies, only New York has prosecuted term-paper companies on the state level, and only the First Circuit has found that their activities violate federal law. Therefore, colleges bear the burden of addressing the problem of students who submit unoriginal work. Colleges must formulate policies and take measures to deter students from patronizing term-papers companies.

Although few states have sought to enforce legislation prohibiting the sale of term papers, state law remains a viable means of inhibiting the sale of prefabricated term papers. Colleges may enforce state law on their campuses to combat the widespread use of purchased course materials submitted for credit. State legislation is directed, however, at those who sell the term papers; it is up to colleges to deal with the students who purchase these papers by taking a firm stance against plagiarism and enforcing strict disciplinary codes against those caught submitting prefabricated work.

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[131] *See Napolitano*, 453 A.2d 279; Peles v. La Bounty, 153 Cal. Rptr. 571 (Cal. 1979) (university refused to accept resignation of student who attempted to resign from graduate program after university notified student of possible honor code violations concerning his thesis); Crook v. Baker, 813 F.2d 88 (6th Cir. 1987) (under Michigan law, the Regents of U.M. had authority and power to revoke a degree on the ground of fraud in the inducement where university found student fabricated data in his master's thesis).

[132] Stanley N. Wellborn, *Cheating in College Becomes an Epidemic*, U.S. NEWS & WORLD REPORT, Oct. 20, 1980, at 39 (the University of Pennsylvania gives an X grade to cheaters that alerts employers and graduate schools of a student's misbehavior). *See also* Michelle N-K Collison, *Survey at Rutgers Suggests That Cheating May Be on the Rise at Large Universities*, CHRON. HIGHER EDUC., Oct. 24, 1990 at A31 (the University of Delaware revamped its academic code in 1985 when a survey by the university found that seventy-eight percent of the students acknowledged that they had cheated; students caught cheating at Delaware now receive a grade of XF on their transcripts).

[133] *Survey: 33 Percent of UCF Students Cheat*, UPI, Mar. 16, 1985 *available in* LEXIS, Nexis Library, Wires File. At the University of Central Florida, it was suggested that a large number of cases go unreported because the faculty is concerned with money shortage at the school, particularly for research.

[134] *See infra* notes 7-10 (federal), 12, 13 (states).

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NOTE

STUDENT CHALLENGES TO GRADES AND ACADEMIC DISMISSALS: ARE THEY LOSING BATTLES?

INTRODUCTION

Courts reviewing student challenges to university conduct go to great lengths to distinguish between disciplinary and academic actions. In suits involving academic dismissals, courts are reluctant to review the dismissal and afford students protection. In actions involving disciplinary dismissals, however, courts are more willing to review the dismissal because disciplinary dismissals involve questions of fact well within the purview of the judicial system and do not require academic expertise.[1] Academic decisions, on the other hand, concern subjective grading decisions which are less factually based than disciplinary decisions.[2] Courts fear that judicial intervention will jeopardize professional autonomy and scholarly integrity.[3]

While courts attempt to afford students protection from arbitrary or bad-faith disciplinary dismissals, they frequently defer to the university in academic decisions.

> Intimidated by the "particular knowledge, experience and expertise of academicians," judges prefer to leave in [university administrators'] hands the procedural and administrative aspects of college life under the assumption that such functions take a purer, less worldly aspect when they are on a campus rather than in a government office or private association.[4]

This Note examines academic dismissals and details the theories and standards of review for academic suits. Part I examines the theories under which students have challenged dismissals. Part II examines the "arbitrary and capricious" standard that courts apply when examining challenges to academic dismissals. Part III examines *Susan M. v. New York Law School*[5], in which the New York Court of Appeals, like other courts considering academic dismissals, denied relief to a student who challenged a test grade, judicial deference to academic decisions and the conflict between a university's academic freedom and a student's due-process rights.

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[1] Emogene C. Wilhelm, Note, *Academic or Disciplinary Decisions: When is Due Process Required? Campbell v. Board of Education*, 6 BRIDGEPORT L. REV. 391, 405 (1985).

[2] *Id.*

[3] Sue Woolf Brenner, *Charlotte's Web: Reflections on the Role of Due Process in Academic Decisionmaking*, 56 INDIANA L.J. 725, 729 (1981).

[4] Laura Krugman Ray, *Toward Contractual Rights for Students*, 10 J. L. & EDUC. 163, 178 (1981).

I. THEORIES UNDER WHICH STUDENTS HAVE CHALLENGED ACADEMIC DECISIONS

Although courts give great deference to university decisions, commentators and the courts have developed several theories to support an academic challenge against an educational institution. Courts most widely use and develop the contract and Fourteenth-Amendment due-process theories.

A. *The Due-Process Challenge*

The Fourteenth Amendment to the United States Constitution provides that no person may be deprived of life, liberty or property without due process of law. Due Process challenges to academic dismissals fall into two categories: procedural and substantive.

1. Procedural Due Process

The Due Process Clause of the Fourteenth Amendment protects individual rights and liberties from arbitrary infringement by governmental bodies. In general, procedural due process mandates that the university give the student some notice or hearing before depriving the student of certain rights and liberties. Until 1961, however, courts maintained a strict policy of not intervening in university affairs. In *Dixon v. Alabama State Board of Education*[6], the United States Court of Appeals for the Fifth Circuit departed from this practice of nonintervention. In *Dixon*, the court held that a public college denied students due process when it expelled the students for engaging in an off-campus demonstration without giving them a hearing or notice of the charges.[7] The court stated that due process required some notice and some opportunity to be heard, even if only an informal interview with an administrative authority. *Dixon* marked the beginning of a period in which courts analyzed expulsions and disciplinary actions by applying constitutional principles to post-secondary institutions. While the case represented a landmark decision for students, the scope of *Dixon* is limited: "*Dixon* draws two sharp boundaries. . . . It applies only to public, and not to private, institutions; it applies only to disciplinary, and not to academic, dismissals."[8]

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[5] 556 N.E.2d 1104 (N.Y. 1990).

[6] 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930.

[7] *Id.* at 153.

Fourteen years after *Dixon*, the United States Supreme Court recognized a student's right to due process in disciplinary actions taken by public institutions. In *Goss v. Lopez*,[9] the Supreme Court held that students attending public institutions are entitled to due-process protection in disciplinary actions because students have recognizable liberty and property interests in their education.[10] The protection accorded to the students includes the right to notice of charges and a hearing on the matter. In *Goss*, public high-school students faced up to ten-days suspension for disciplinary reasons. The high-school status of the students in *Goss*, however, limited the applicability of the Court's ruling because high-school students have an entitlement to an education under state law, while college students do not.[11] In spite of the fact that *Goss* involved high-school students and a disciplinary dismissal, several lower courts have used the Supreme Court's recognition of property and liberty interests in high-school education to extend protection to academic decisions in higher education.[12]

The cases in which courts have extended due-process protection to students regarding academic decisions have not involved subjective evaluations of a student's performance on a test. Rather, they have involved procedural issues of notification, classification, and actions taken by the school to defame a student's ability to obtain employment after leaving the school.[13] These courts recognized the students' constitutionally-protected liberty and property interests in education.[14]

The Supreme Court in *Board of Curators v. Horowitz*[15] isolated these cases and limited their influence on future decisions. In *Horowitz*, the University of Missouri dismissed a medical student during her final year of study, after determining that she lacked the necessary skills to be a competent physician.[16] The University had advised Horowitz as early as her first year of study that her clinical skills were deficient and that she advanced to her last year of study on probation.[17] The Court assumed Horowitz possessed a liberty or property interest but concluded that Horowitz had received procedural due process.[18] The university satisfied the student's Fourteenth-Amendment due-process rights by informing her of the faculty's dissatisfaction with her clinical performance and the danger this posed to her continued enrollment. The Court also specifically held that universities are not required to provide a formal hearing for students.[19]

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[8] Ray, *supra* note 4, at 163.

[9] 419 U.S. 565, 95 S. Ct. 729 (1975).

[10] *Id.* at 573, 95 S. Ct. at 734.

[11] Audrey Wolfson Latourette & Robert D. King, *Judicial Intervention in the Student-University Relationship: Due Process and Contract Theories*, 65 DET. L. REV. 199, 207 (1988).

[12] *Id. See, e.g.* Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975); Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975).

[13] Ray, *supra* note 4, at 181. *See* Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975). In *Greenhill*, a medical school notified the association of medical schools that the school dismissed the student because of his lack of intellectual capacity and insufficient course preparation. The court concluded that this deprived the student of a liberty interest, entitling the student to a hearing. *Id.* at 8; Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975). In *Gaspar*, the court held that a student who was dismissed from nursing school for academic reasons had the right to be made aware of her failure to meet academic standards and that the school had fulfilled that right. *Id.* at 850-51.

[14] *See Greenhill*, 519 F.2d 5; *Gaspar*, 513 F.2d 843.

[15] 435 U.S. 78, 98 S. Ct. 948 (1978).

[16] *Id.* at 80, 98 S. Ct. at 950.

The *Horowitz* decision raised more questions than it answered.[20] Justice Rehnquist's opinion never specifically adopted the "arbitrary and capricious" standard, the standard widely used by courts to decide academic-dismissal cases, nor did the Court resolve the question of whether a student at a public college has a liberty or property interest in education.[21] Because the Supreme Court did not decide this issue, many courts assume that a liberty or property interest protects some student rights in challenges to institution decisions.[22] These courts automatically apply the Due-Process Clause and address whether the institution deprived the student of these rights without procedural or substantive due process.[23]

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[17] *Id.*

[18] *Id.* at 82, 98 S. Ct. at 952. After a review of the University's procedures, the Supreme Court concluded that Horowitz had been awarded as much due process as the Fourteenth Amendment requires. Horowitz had been informed of the school's dissatisfaction with her performance after her first year of study; a faculty-student evaluation committee reviewed her case and recommended her dismissal from school; the school permitted her to take a set of exams before a group of physicians as an appeal and only two of the group recommended that she be allowed to continue her studies; the dean notified Horowitz of the decision to dismiss and Horowitz appealed to the University's Provost for Health Sciences. The Provost sustained the dismissal. *Id.* at 80-82, 98 S. Ct. 950-51.

[19] *Id.* at 86, 98 S. Ct. at 953 (1978). The Court in *Horowitz* also noted that the evaluative nature of the inquiry and the historically supported interest of the school in preserving its present framework for academic evaluations led to the conclusion that due process did not require a hearing. *Id.* at 86, n.3, 98 S. Ct. at 953, n.3.

[20] *Id.* at 90, 98 S. Ct. at 955. The Supreme Court's lack of clarity in issuing its opinion has resulted in lower courts interpreting *Horowitz* in a number of different ways. Some courts interpret *Horowitz* to mean that students are not entitled to any procedural due-process rights in an academic dismissal. Other courts have interpreted *Horowitz* literally and have stated: "Dismissals of a student for academic reasons comports [sic] with the requirements of procedural due process if the student had prior notice of faculty dissatisfaction with his or her performance and of the possibility of dismissal, and if the decision to dismiss the student was careful and deliberate." Schuler v. University of Minn., 788 F.2d 510, 514 (8th Cir. 1986). Another court interpreting *Horowitz* held that informal sessions between faculty and student meet due-process requirements. See Mauriello v. University of Medicine and Dentistry of N.J., 781 F.2d 46, 50 (3d Cir. 1986), *cert. denied*, 479 U.S. 818, 107 S. Ct. 179 (1986). The most unique interpretation of *Horowitz* was espoused by Judge Muir in 1983. He stated that although a full hearing was not required by due process in an academic dismissal, the student would have to be "given an opportunity to explain the reasons for his poor scholarship and to provide any information which might lead the administration to conclude that [the plaintiff's] performance in the future would be satisfactory." See Ross v. Pennsylvania State Univ., 445 F. Supp. 147, 153-154 (M.D. Pa. 1978). *See also* Latourette, *supra* note 11, at 221-23.

[21] W. Kaplan, The Law of Higher Education, at 296 (2d ed. 1985).

The nature of procedural due process negates the use of inflexible review and hearing procedures.[24] No inflexible standard is readily adaptable to a hearing to determine whether a student received fair treatment. The Supreme Court noted the need for flexibility in *Horowitz*:

> [T]he need for flexibility is well illustrated by the significant differences between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal.

Overall, however, *Horowitz* did little to clarify the right of procedural due process in academic decisions. It remains evident that students will receive less procedural due process in academic disputes than in disciplinary disputes. It is also evident that a student alleging a violation of procedural due process in an academic dispute will rarely prevail on appeal.[25]

2. Substantive Due Process

As noted above, the procedural requirements in academic-dismissal cases are minimal. Only in rare situations will the courts find that an educational institution's actions violated a student's procedural due-process rights. While procedural due process is concerned with the procedure used to make a decision, substantive due process, on the other hand, is concerned with protecting the individual from arbitrary action and looks at the decision itself. Substantive due process requires that all government actions have a fair and reasonable impact on life, liberty or property.[26]

Substantive due-process challenges in the academic arena strike at the academic decision itself and not the procedures afforded the student in the academic decision-making process. A substantive due-process challenge opposes the authority which grants complete deference to colleges and universities in academic decisions.[27] Even under substantive due process, however, the student's challenge is limited:

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[22] *See* Amelunxen v. Univ of Puerto Rico, 637 F. Supp. 426 (D. P.R. 1986). *See, e.g.*, Nash v. Auburn Univ., 812 F.2d 655, 660 (11th Cir. 1987); Schuler v. Univ. of Minn., 788 F.2d 510, 513-14, n.6 (8th Cir. 1986) (assuming the existence of a liberty or property interest).

[23] Latourette, *supra* note 11, at 210-11.

[24] *Id.*

[25] *See* Susan M. v. N.Y. Law School, 556 N.E.2d 1104 (1990).

[26] Donald H. Henderson & Barry P. Isenberg, *The Law and Academic Evaluation and Dismissal in Higher Education*, 13 CUMBERLAND L.REV. 475, 482 (1983).

> [A]lthough we have emphasized that the determinations of educational institutions as to the academic performance of their students are not completely beyond the scope of judicial review, that review is limited to the question of whether the challenged determination was arbitrary and capricious, irrational, made in bad faith or contrary to constitution or statute.[28]

Unfortunately, the Supreme Court's guidance on substantive due process in the academic arena is as confusing as its guidance on procedural due process because the Court has not expressly adopted the "arbitrary and capricious" standard widely used by lower courts in reviewing academic dismissals.

While commentators and lower courts most often cite *Horowitz* for its procedural due-process discussion, the Supreme Court also addressed substantive due process. The Court noted that some lower courts have implied that they can address academic dismissals only if the student shows that the university acted arbitrarily or capriciously.[29] The Court in *Horowitz* assumed that a court could review an academic dismissal using such a standard, but held that in this case the university had not acted arbitrarily.[30]

Many students who challenge academic dismissals allege educational decisions violated substantive due process because they were made in bad faith or were arbitrary and capricious. The Supreme Court has provided guidance in determining whether a university acted arbitrarily or capriciously. In *Regents of University of Michigan v. Ewing*,[31] for example, the Supreme Court expanded the standard of review and stated that no substantive due-process violation occurs when the decision "is not beyond the pale of reasoned academic decision making,"[32] or when there is no "substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment."[33]

In *Ewing* the Supreme Court made clear the proposition that students' rights in academic decisions were minimal. In *Ewing*, a student failed a qualifying exam after his fourth year of study, with the lowest score in the history of the University's six-year undergraduate and medical joint-degree program.[34] Despite the fact that plaintiff Ewing was the only student to whom the University denied the opportunity to retake the exam, the Court held that: "the record unmistakably demonstrates . . . that the faculty's decision was made conscientiously and with careful deliberation based on an evaluation of the entirety of Ewing's academic career."[35] The Supreme Court once again assumed that a constitutionally protected property right existed and stated, without analyzing the issue, that even if Ewing's property interest gave rise to a substantive property right under the due-process clause, the facts disclosed no arbitrary action.[36]

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[27] Latourette, *supra* note 11, at 224. *See Greenhill*, 519 F.2d 5; *Gaspar*, 513 F.2d 843.

[28] *Susan M.*, 556 N.E.2d at 1107.

[29] 435 U.S. at 91, 98 S. Ct. at 956.

[30] *Id.* at 91-92, 98 S. Ct. at 956.

[31] 474 U.S. 214, 106 S. Ct. 507 (1985).

[32] *Id.* at 227-28, 106 S. Ct. at 514-15.

[33] *Id.* at 227, 106 S. Ct. at 514. *See also* Haberle v. Univ. of Ala. in Birmingham, 803 F.2d 1536, 1540 (11th Cir. 1986) (holding that a student dismissal was not arbitrary and capricious and that the use of ad hoc procedures to dismiss a Ph D student did not violate the student's procedural due-process rights when the student was given the opportunity to complain).

Lower courts continue to follow the Supreme Court's lead in *Horowitz* and *Ewing* and assume that a liberty or property interest existed and proceed to evaluate the due process afforded a student.[37] These courts also follow *Horowitz* and *Ewing* in granting students minimal substantive due process. Students rarely prevail in a judicial substantive due-process review: "Absent an unequivocally unfair academic decision, the courts will simply not intrude."[38]

B. *Contract Theory*

While due-process challenges have afforded students at public colleges and universities a weapon with which to attack academic or disciplinary dismissals, students at private colleges and universities do not enjoy such rights. For a court to entertain a due-process challenge, either procedural or substantive, state action must exist. Although courts have attempted to find some form of state action in private institutions, these attempts have not fared well.[39]

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[34] 474 U.S. at 216, 106 S. Ct. at 508. Ewing had experienced persistent problems in his studies, receiving a number of low passing grades, incompletes and make-up exams. Ewing argued that students were routinely allowed to retake the exam and offered statistical evidence to support his contention. *Id.* at 217-19, 106 S. Ct. at 510.

[35] *Id.* at 225, 106 S. Ct. at 513. *See also* Latourette, *supra* note 11, at 225, n.126.

[36] *Id.* at 223, 106 S. Ct. at 510. The Court unanimously held that a court may not "override [an academic decision] unless it is such a substantial departure from academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.* at 225, 106 S. Ct. at 513. See Latourette, *supra* note 11, at 225.

[37] *See* Schuler v. Univ. of Minn., 788 F.2d 510 (8th Cir. 1986).

[38] Latourette, *supra* note 11, at 227.

[39] Plaintiffs have tried argue that state action exists based on state financial aid, state regulation, and the importance of public education. *See, e.g.*, Robinson v. Davis, 447 F.2d 753 (4th Cir. 1971), *cert. denied*, 405 U.S. 979, 92 S. Ct. (1972)(holding that the college was not a state actor and students' civil rights were not violated when college officials and security officers who held part-time jobs in town questioned the students at a drug hearing); Smith v. Duquesne Univ., 612 F. Supp. 72 (D.C. Pa. 1985)(holding that the university was not a state actor because state financial contributions to the school were miniscule); State v. Cornell, 510 N.Y.S.2d 313 (N.Y. App. Div. 1987)(holding that

While students at public institutions enjoy the benefits of both due-process and contract challenges, students at private institutions must rely solely on a contractual theory to attack a university decision.

> Courts view the student-university relationship as contractual and hold that when a student is duly admitted to a private university, there is an implied contract with the university that if he complies with the terms prescribed by the university, he will obtain the degree that is sought. . . . The college has a basic contractual obligation with the student not to engage in arbitrary expulsion or denial of a degree.[40]

The contract theory of interpreting the student-university relationship has existed for one-hundred years. Courts, however, are most reluctant to interfere in academic decisions and matters of subjective interpretation. "In breach of contract actions premised on academic judgments, courts exhibit greater deference to the institutional autonomy and expertise. A student will be entitled to judicial review in this area when it is demonstrated that a university decision was motivated by bad faith or arbitrary or capricious action."[41]

Aside from the 1891 decision in *People ex rel. Cecil v. Bellevue Hospital Medical College*,[42] which asserted a student's contractual right to a degree, very few courts have enforced a student's contract rights in academic affairs. While the *Bellevue* court recognized a student's right to be free from arbitrary decision-making, the court also indicated that it would not intervene in the university's discretionary decisions, such as grading exams.[43]

Most cases in which students have successfully persuaded courts to enforce contract rights have been decided on principles of estoppel.[44] In such cases college officials incorrectly advised students and the courts held these officials to their promises.[45] The use of estoppel principles does have its failures. Some courts refuse to apply the

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the university's receipt of financial aid from the state did not constitute a sufficient degree of state involvement). Some courts have specifically held that due-process analysis is inapplicable to private institutional decisions. See Coveney v. President & Trustees of Holy Cross College, 445 N.E.2d 136 (Mass. 1983). The Fifth Circuit, however, found that the University of Tampa was a state actor because it used surplus city buildings and land. See Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965). *See also* Latourette, *supra* note 11, at 205.

[40] Latourette, *supra* note 11, at 231.

[41] *Id.* at 248.

[42] 14 N.Y.S. 490 (N.Y. Sup. Ct.), *aff'd*, 28 N.E. 253 (1891).

[43] *Id.*

[44] *See* Ray, *supra* note 4, at 173.

[45] *See* Healy v. Larsson, 323 N.Y.S.2d 625 (1971), *aff'd*, 348 N.Y.S.2d 971 (N.Y. App. Div. 1973), *aff'd mem.*, 360 N.Y.S.2d 419 (1974)(holding that an implied contract exists between a student and a university; if a student complies with the terms prescribed by the university or its agents, the student will obtain the degree sought).

principles of estoppel mechanically to override a determination of a student's academic qualifications.[46]

The contractual student-university relationship is unique and the elements of traditional commercial-contract law cannot be applied rigidly.[47] One commentator has characterized the the student-university relationship as follows:

> This contract is conceived as one by which the student agrees to pay all required fees, maintain the prescribed level of academic achievement, and observe the school's disciplinary regulations, in return for which the school agrees to allow the student to pursue his course of studies and be granted a diploma upon the successful completion thereof. Since a formal contract is rarely prepared, the general nature and terms of the agreement are usually implied, with specific terms to be found in the university bulletin and other publications; custom and usages can also become specific terms by implication. This contract has been upheld against attacks based upon the lack of consideration, the statute of frauds, and the lack of mutuality of obligation.[48]

By rejecting a rigid application of contract principles to the student-university relationship, courts may defer to academic discretion, giving universities and colleges wide latitude in decisions involving academic judgments.[49]

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[46] In *Olsson v. Board of Higher Educ. of the City of NY*, 402 N.E.2d 1150 (1980), the New York Court of Appeals deferred to the academic judgment of the institution in declining to award a student a degree by estoppel. The student had not passed a comprehensive exam and claimed that the professor misled him concerning the required passing grade. The court emphasized that the institution had offered the student an opportunity to retake the exam. The court also stated:

> When an educational institution issues a diploma to one of its students, it is in effect, certifying to society that the student possesses all of the knowledge and skills that are required by his chosen discipline. In order for society to be able to have complete confidence in the credentials dispensed by academic institutions, however, it is essential that the decisions surrounding the issuance of these credentials be left to the sound judgment of the professional educators who monitor the student on a regular basis.

Id. at 1153. *See also* Kaplan, *supra* note 21 at 298.

[47] See Slaughter v. Brigham Young Univ., 514 F.2d 677 (10th Cir.) cert. *denied*, 423 U.S. 898, 96 S. Ct. 202 (1975)(holding that a student expelled from graduate school for academic dishonesty was provided due process at a university expulsion hearing and the application of rigid commercial contract doctrine was an error since the existence of a contract was not established by the graduate-school catalog or the honor code. Some aspects of contract law, however, could be applied).

[48] Eugene L. Kramer, Note, *Expulsion of College and Professional Students - Rights and Remedies*, 38 NOTRE DAME L.J. 174, 183 (1962). *See also* Latourette, *supra* note 11, at 234.

[49] *See* Lyons v. Salve Regina College, 565 F.2d 200 (1st Cir. 1977), *cert. denied*, 435 U.S. 971, 98 S. Ct. 1611 (1987). In *Lyons*, a nursing student received a failing grade

Commentators have both praised and attacked the contract theory. "It has been described as 'an inherently poor vehicle for judicial review of private organizations, including the university,' because it is designed to resolve conflicting individual interests, not 'the competing interests of groups, individuals, and society.'"[50] The contract theory has also been criticized as rigid, and challenged on the grounds that faculty, students, and administrators do not perceive their activities as contractual.[51]

On the other hand, the theory has been praised as a vehicle that extends due process and equal protection to students at private colleges and universities in the absence of state action. Some commentators have suggested that the contract theory could be used to enlarge the boundaries of judicial review and to develop a system of private contract law.[52]

C. *Other Theories*

While not often successful, some new theories support a student's challenge to an academic dismissal. In *Morrison v. University of Oregon Health Sciences Center*,[53] a student obtained judicial review of a university decision to dismiss the student from dental school. The student argued that the dispute with the university was a contested case and subject to review under state administrative-procedures laws.[54] Moreover, in *Tarka v. Cunningham*,[55] a student challenged an academic decision using the Family Educational Rights and Privacy Act of 1974.[56]

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from an instructor who she claimed had promised her a grade of incomplete. After proceeding through the college's academic-review procedures, the student was forced to graduate as a psychology major, rather than as a nursing major. The district court and the appellate court disagreed on how to interpret the student-university contract. The district court rejected the protection of academic freedom and stated that contract principles are well suited to academic matters. Lyons v. Salve Regina College, 422 F. Supp. 1354, 1359, n.6 (D.R.I. 1976). The appellate court noted, however, that the unique nature of the student-university relationship and the principle of academic freedom made it difficult to apply rigid contract principles. 565 F.2d at 204.

[50] Ray, *supra* note 4, at 169.

[51] *Id.*

[52] *Id.*

[53] 685 P.2d 439 (Or. Ct. App. 1984).

[54] Oregon law provided that when a state agency suspends or revokes a person's right by means of an administrative procedure it is a contested case and subject to judicial review. *Id.* at 440.

[55] 741 F. Supp. 1281 (W.D. Tex. 1990). In *Tarka*, pursuant to the Family Educational Rights and Privacy Act, a student challenged a grade received in a university physics class.

[56] 20 U.S.C. § 1232g(a)(2) (West 1990) (providing that no federal funds shall be made available to any educational agency or institution unless parents of students who have been in attendance at such an institution are provided an opportunity for a hearing for the purpose of insuring that the content of the student's education records are not inaccurate, misleading, or otherwise in violation of the privacy rights of the student.) *See Tarka*, 741 F. Supp. at 1282.

The court dismissed the action, holding that the Act did not provide a means by which a student could obtain information about how the university assigned a particular grade. Rather, the Act entitled the student to information on whether the university accurately recorded the grade in the student's records. Although the student was unsuccessful, this case demonstrates that other theories outside a due-process or contract challenge may exist.[57]

One route a group of students at George Washington Law School successfully chose to pursue was an internal Faculty Peer Review Committee. Stating that students in the first year property class were "victim[s] of a capricious academic evaluation," a faculty committee recommended throwing out the grades of two students who had petitioned the committee and giving them the option of taking a pass/fail grade or taking the course over again with another professor.[58] The university gave other students the option of keeping their grades or filing similar complaints with the committee.[59]

II. THE "ARBITRARY AND CAPRICIOUS" STANDARD

A plaintiff must meet a difficult burden of proof when challenging, on the basis of substantive due-process rights or contract principles, university decisions in academic affairs. Courts limit the review of an academic decision "to the question of whether the challenged determination was arbitrary and capricious, irrational, [or] made in bad faith."[60] While courts often cite this standard as the cornerstone for review of an academic decision, they do not provide guidance as to what sort of actions would be considered arbitrary or capricious. More often than not, courts will cite the standard and then find that defendants actions were not arbitrary or capricious.

The Supreme Court first addressed the "arbitrary and capricious" standard in *Horowitz*.[61] Justice Rehnquist's majority opinion did not specifically adopt the standard, and therefore did not address its application to the case. The Court stated: "[A]ssuming that the courts can review under such a standard an academic decision of a public educational institution, we agree with the District Court that no showing of arbitrariness or capriciousness has been made in this case."[62] Like most other courts, the Supreme Court did not delve into the area of grades. If a university follows its established procedures and shows that all students are evaluated according to the same academic standards, a court will not find that a university's decision to dismiss a student was arbitrary and capricious.

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[57] *Tarka*, 741 F. Supp. at 1282.

[58] Ken Myers, *GW Professor Protests Action To Throw Out Students' Grades*, NAT'L L.J., November 26, 1990, at 4.

[59] *Id.*

[60] *Susan M.*, 556 N.E.2d at 1107.

[61] 435 U.S. at 91, 98 S. Ct. at 956.

[62] *Id.* at 91-92, 98 S. Ct. at 956. The Court based its finding that Horowitz had not shown arbitrariness or capriciousness on the district court's finding that the university did not evaluate Horowitz differently from other students because of her sex, religion or physical appearance. The record also clearly showed that the university followed its established rules an procedures and designed "new" rules in a further attempt to protect Horowitz, such as the appeal the university allowed. *Id.*

The Supreme Court once again addressed the "arbitrary and capricious" standard in *Regents of University of Michigan v. Ewing.*[63] While the Court did not expressly adopt the standard, it did provide some further guidance. The Court stated: "When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[64] The Court also stated that a decision to dismiss is not "beyond the pale of reasoned academic decisionmaking when viewed against the background of [the student's] entire career. . . ."[65]

Guidance on the "arbitrary and capricious" standard is limited. One court stated that "the student would still have to demonstrate arbitrary and capricious conduct on the part of the university officials by showing that there was no rational basis for the university's decision or that dismissal was motivated by bad faith or ill will unrelated to academic performance."[66] A review of the decisions involving academic disputes reveals that a university's conduct is not arbitrary and capricious if a modicum of fairness was obtained at the university level. If a student is aware of substandard academic performance or a professor has exercised rational judgment in grading an exam, a court will not review a university's decision to dismiss.

III. *Susan M. v. New York Law School:* A Short-Lived Victory

Susan M. v. New York Law School[67] represented both a break from the traditional treatment of academic dismissals and an adherence to the non-interventionist approach. While the Supreme Court of New York dismissed Susan M.'s petition to challenge her grade, the Appellate Division of the New York Supreme Court remanded for further review of the grade. The Court of Appeals in New York, however, found that it was not necessary to review the case further and dismissed the case.[68]

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[63] 474 U.S. 214, 106 S. Ct. 507 (1985).

[64] *Id.* at 225, 106 S. Ct. at 513.

[65] *Id.* at 228, 106 S. Ct. at 514-15. The Court noted that it may have been unwise for the university to deny Ewing a second opportunity to take an exam. A second exam would have saved the university the expense of litigation and may have demonstrated that the members of the Promotion and Review Board misjudged Ewing's fitness for the medical profession. While the Court noted its misgivings, it held that the decision by the Board was rationally based on Ewing's poor academic performance. *Id.* at 227-28, 106 S. Ct. at 514.

[66] Schuler v. Univ. of Minn., 788 F.2d at 515. *See also* Mauriello v. Univ. of Medicine and Dentistry of N.J., 781 F.2d 46, 51 (3d Cir. 1986).

[67] 556 N.E.2d 1104 (1990).

A. *Susan M.*

Susan M. was completing her fourth semester at New York Law School when the School's Academic Status Committee notified her that they would consider whether she would be allowed to continue at the School.[69] The Committee issued this notification because Susan M. failed to maintain a cumulative C average. Under the School's published rules, a student who did not maintain a cumulative C average was placed on academic probation.[70] Thereafter, if a student on academic probation failed to achieve at least a C average each semester and a cumulative average of C, the Academic Status Committee had discretion to dismiss the student.[71]

The Committee afforded Susan M. the right to present oral and written statements explaining her failure to meet the Law School's academic standards.[72] She did so, blaming her unacceptable average on two grades: a C- in Constitutional Law II and a D in Corporations.[73] The Committee voted unanimously to dismiss Susan M. for failure to meet the school's academic standards.[74] Susan M. requested that the Committee reconsider the case and submitted additional reasons for her poor academic performance.[75] The Committee accepted the submissions, but refused to reconsider the case.[76]

B. *The Court Challenge*

Susan M. challenged her dismissal and sought reinstatement at New York Law School.[77] The New York Supreme Court dismissed the petition, but the Appellate Division reversed.[78] The Appellate Division gave considerable attention to Susan M.'s Corporations grade. New York Law School argued that the Corporations grade was irrelevant because the School based its decision to dismiss on "the totality of Susan M.'s academic performance."[79] The court rejected this argument as grounds for dismissal, however, finding that a C+ in Corporations would have allowed Susan M. to maintain a C average.[80] "If petitioner's transcript is any guide to her total academic performance, it does not appear that a C+ was utterly beyond her capabilities."[81] The court noted that it was not second-guessing the professor, but that when the right to remain enrolled was at stake, it could not preclude the possibility that an irrational reading of the exam impaired the grading.[82] In remanding the matter for further consideration of the Corporations grade, the court pointed out that it was not suggesting that Susan M. deserved a certain grade; the court remanded the case merely because New York Law School's decision to dismiss should not have been made in the absence of reasonable assurances that the grade of zero given to an essay was a rational exercise of discretion.[83] The court also cited the "arbitrary and capricious" standard, stating that the issue was not what grade the student deserved, but whether the grade was given arbitrarily and capriciously. While the court did not give particular guidance on how to the apply the standard, it stated that "concrete allegations of flagrant misapprehension on the part of the grader entitle the student to a measure of relief."[84]

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[68] In New York, the Supreme Court is the trial court, the Appellate Division of the Supreme Court is the intermediate appellate court, and the Court of Appeals is the state's highest court.

[69] Susan M., 556 N.E.2d at 1105.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] In her petition Susan M. alleged that the Committee's decision to dismiss her was arbitrary and capricious and that her academic performance was attributable to irrational grading in three of her four classes. She also contended that the Committee did not weigh personal factors and that she was dismissed in retaliation for complaining about her grades. *Id.* at 1106.

[78] In dismissing the petition the Supreme Court concluded that Susan M. had not shown that her dismissal was arbitrary, capricious or in bad faith. The Appellate Division rejected most of the claims, but reversed and remanded the matter for further consideration of Susan M.'s Corporations grade. *Id.* (*citing* Susan M. v. New York Law School, 544 N.Y.S.2d 829 (N.Y. App. Div. 1989)).

Susan M.'s victory at this first level of appellate review was short-lived. On appeal, the Court of Appeals denied Susan M.'s challenge as inappropriately involving the court in the core of academic and educational decisions.[85] Susan M.'s allegations went to the heart of the professor's substantive evaluation of her academic performance which was "beyond the scope of judicial review."[86] According to the Court of Appeals, if the judiciary becomes involved in assessing particular grades, countless numbers of unsuccessful students seeking reassessments of grades would undermine the credibility of academic decisions.[87]

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[79] *Susan M.*, 544 N.Y.S.2d at 831.

[80] *Id.*

[81] *Id.* Susan M.'s low Corporations grade was attributed to zero credit for an essay question worth thirty percent because she analyzed a question according to New York and Delaware law rather than just Delaware law as the question called for. The court pointed out the fact that Susan M.'s receiving a D and not an F indicated the positive quality of her answer. *Id.*

[82] *Id.* at 831-32.

[83] *Id.* at 832.

[84] *Id.* The court also noted that the petition to dismiss should not have been granted in the absence of reasonable assurances that the Corporations grade was a rational exercise of discretion by the grader. *Id.*

[85] 556 N.E.2d at 1105.

[86] *Id.*, *citing Ewing*, 474 U.S. at 225, 106 S. Ct. at 513.

[87] *Susan M.*, 556 N.E.2d at 1107.

C. *The Implications of Susan M.*

The reasoning of the Court of Appeals tracked that of other courts in addressing dismissals involving subjective academic judgments. Susan M.'s allegations were directed at the pedagogical evaluation of her test grades, a determination courts often find is best left to educators rather than to the judiciary.[88] While the Supreme Court of New York tried to reason around the substantive grade and look only at the procedure involved in assigning the grade, the Court of Appeals linked the substance and procedure. New York Law School specifically set out the academic qualifications required of a student and the procedure to be followed if a student was to be judged academically insufficient. Beyond any procedural irregularities, the Court of Appeals would not engage in a substantive evaluation of the student's academic performance.

Courts will go to great lengths to distinguish academic from disciplinary dismissals and procedural from substantive reviews. "What an educator teaches, how he teaches it, how he encourages a student to respond to his subject matter, these are legitimately privileged areas. But administrative decisions that affect a student's right to continue in a program, or a college, or a profession need not implicate [academic freedom]."[89] In general, academic affairs tend to involve more subjective judgments concerning scholarship and academic expertise. Disciplinary proceedings, in contrast, are more adversarial than academic proceedings and involve questions of fact which courts feel more comfortable in addressing.[90] Courtstand on more familiar ground when addressing disciplinary actions because in so doing they evaluate specific procedures and determine whether the institution's proceedings adequately investigated and assessed a student's guilt.[91]

If a student seeks to challenge a dismissal on academic grounds, the student must show that bad faith, arbitrariness or capriciousness motivated the dismissal.[92] Students have rarely satisfied this standard "because the courts have repeatedly refused to become involved in the pedagogical evaluation of academic performance."[93] When a student has successfully challenged an academic dismissal, the challenge related to the administrative procedure (*i.e.*, notice requirements) and not the substantive grade itself.[94] A court will not reassess the merit of an examination answer to determine whether a student deserved a certain grade.[95]

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[88] *Id.*

[89] Ray, *supra* note 4, at 184.

[90] *Id.*

[91] *Id.* at 180.

[92] Connelly v. Univ. of Vt. State Agric. College, 244 F. Supp. 156, 159 (D. Vt. 1965) (recognizing a student's right to a hearing to determine if a grade was assigned arbitrarily, capriciously, or in bad faith).

[93] *Susan M.*, 556 N.E.2d at 1107.

[94] *See Horowitz*, 435 U.S. 78, 98 S. Ct. 948 (1978). In *Horowitz* the Court held: "Academic evaluations of a student, in contrast to disciplinary determinations, bear little

At the heart of the courts' reluctance to engage in a substantive review of an exam grade is the integrity of an institution and implications of academic freedom. Academic freedom involves protected areas of thought and expression in scholarship and in teaching.[96] Courts recognize the importance of academic freedom and autonomy and accord great deference to educational institutions in academic affairs.

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.[97]

Courts fear that if they interfere in the grading process, the court and not the institution would be certifying that the student possessed all the skills for completion of the course.[98] "[I]t is essential that the decisions surrounding the issuance of these credentials be left to the sound judgment of the professional educators who monitor the progress of their students on a regular basis."[99]

High standards in reviewing academic dismissals are necessary for institutions to maintain their integrity, and for college diplomas to maintain their significance. Academic freedom dictates that institutions be the sole judges of who receives a degree. Degrees from different institutions hold different honors. If courts apply a uniform standard to judge student grades, the individuality of an institution's diploma would be diminished.

CONCLUSION

A student challenge to an academic dismissal is an arduous and virtually insurmountable one. The "arbitrary and capricious" standard imposed by the courts places a heavy burden on the plaintiff. While some theories would allow a student to bring an academic challenge

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resemblance to the judicial and administrative factfinding proceedings to which we have traditionally attached a full-hearing requirement." The Court also stated that academic judgments are more subjective than factual determinations inherent in disciplinary proceedings which warrant procedural due-process reviews. *Id.* at 89-90, 98 S. Ct. at 955.

[95] *See Susan M.*, 544 N.Y.S.2d at 832.

[96] *Id.*

[97] Sweezy v. New Hampshire, 354 U.S. 234, 263, 77 S. Ct. 1203, 1218 (1957) (quoting a statement of a conference of senior scholars from the University of Cape Town and the University of Witwatersrand).

[98] *See* Olsson v. Board of Higher Educ. of the City of N.Y., 402 N.E.2d 1150 (1980).

[99] Kaplan, *supra* note 21, at 299.

357

against a post-secondary institution, courts rarely disturb the decisions of professors and university administrators. It is virtually impossible for a student to challenge a subjective, pedagogical evaluation of an examination answer.

Judicial deference to academic prerogatives has eroded over the years and many courts state that "the determinations of educational institutions as to the academic performance of their students are not completely beyond the scope of judicial review."[100] Student challenges to testing and grading procedures, however, remain a losing cause. If a professor rationally grades an exam, showing no bad faith or irrationality in assigning a grade, the courts will defer to the professor's discretion.

As long as the university adheres to its academic standards and follows procedures for dismissals or grievances, both faculty and administrators should feel confident that their decisions will not be disturbed. Indeed, colleges and universities should set up review procedures to keep academic disputes within the academic arena, where they belong.

Students who wish to challenge testing and grading procedures should assess the situation carefully before undertaking legal action. Students who do challenge their institutions or risk dismissal for failing to meet academic requirements find themselves in a "Catch-22" situation. If a student has a superior chance of winning a challenge brought against a university, undertaking such litigation may cast a cloud upon a student's name, especially in a graduate-degree program. The costs and benefits should be weighed carefully.

*Dina Lallo**

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[100] *Susan M.*, 556 N.E.2d at 1107.

* B.A., Providence College, 1989; J.D., Candidate, Notre Dame Law School, 1992.

HOW DO WE MANAGE THE RIGHT TO HATE*

JUDGE ABNER J. MIKVA**

In *R.A.V. v. City of St. Paul*,[1] the Supreme Court unanimously struck down the St. Paul ordinance prohibiting the display of "fighting words" symbols. Is there anything left to discuss? Has the Court simply told all of us that there is no way to manage hate, and that it must be allowed to flourish on campuses as it does everywhere else? My unequivocal answer is maybe, but probably not. In any event, I will assume that all institutions of higher education, public and private, want to follow the law of the land, whether they need to or not.

Some things from the *R.A.V.* decision are clear. First and foremost, Justice Scalia assumed a far-reaching mode when he penned the majority position for himself and four of his colleagues. The case could have been resolved on a score of lesser doctrines than the one Justice Scalia settled upon. Nonetheless, it is not really fair to criticize only the Court for reaching out to decide a tough question in the broadest possible way. That problem began when the prosecutor in St. Paul decided that *R.A.V.* was a good case in which to test the ordinance. The conduct of R.A.V. included burning a cross on a black neighbor's lawn. St. Paul does have laws prohibiting trespass, destruction of property and other laws—-all of which could have punished the transgressor as much as or more than the misdemeanor ordinance used in the case. This is but one more example of the uncontrollable itch that lawyers and judges get to be involved in and decide seminal constitutional issues. All of us want to be involved in the next *Peter Zenger*[2] case or the next *Beauharnais v. Illinois*.[3] And so that nice, comfortable law-school precept to avoid constitutional questions if at all possible has become as obsolete as the Rule in *Shelley's* case. One way in which colleges and universities can manage their problems is to use the laws and rules that everyone accepts—those prohibiting destruction of property, assault, intimidation.

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* This Commentary grows out of a presentation to the Annual Meeting of the National Association of College and University Attorneys, Chicago, Illinois, June 28, 1992. The notes accompanying this article are citations to authority and contain nothing of substance. *See* Abner J. Mikva, *Goodbye to Footnotes*, 65 U. Colo. L. Rev. 647 (1985).

** Chief Judge, United States Court of Appeals for the District of Columbia Circuit.

[1] R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

[2] "Today's Peter Zenger" v. County Clerk of New York County, 182 N.Y.S.2d. 730 (1959).

[3] Beauharnais v. Illinois, 343 U.S. 250, 72 S. Ct. 725 (1952).

Basically, St. Paul lost its right to apply its ordinance because of "underbreadth." This halitosis of the legal landscape emanates from laws that are too selective in what they proscribe. If St. Paul had chosen to ban *all* fighting words, it would have prevailed. Justice Scalia explained this difficulty by pointing out that the ordinance, by limiting its proscriptions to only those fighting words that aroused anger as a result of race, color, creed, religion or gender, engaged in content-based regulation of speech. Justice White and three colleagues thought that the Court had reached and overreached. They joined in the judgment of the Court, "but not the folly of the opinion."[4]

How does all of that "sturm und drang" relate to the narrow topic of this commentary? How does *R.A.V.* affect all of the campus codes on which so much midnight oil has been burned? It probably knocks most of them in a cocked hat—in their present form. Most of the ones that I have seen suffer from the halitosis of underbreadth. They are limited to regulating conduct with a race-sex-religion tilt. Some have less underbreadth than others. The University of Wisconsin "UW Rule,"[5] for example, covered, in addition to the big three, color, creed, disability, sexual orientation, national origin, ancestry and age. I assume that the age epithets could be that the target was either too young or too old to be a campus resident. (In fact, when the federal court threw out the Wisconsin code, it claimed that the rule suffered from "overbreadth."[6] It clearly will be hard to find the right amount of breadth to pass court muster.)

If I seem to make light of a serious problem in the administration of higher education, I do not mean to do so. I do want to make light of the manner in which most colleges and universities have sought to manage the problem, and to make even lighter of the fora in which the problems have been resolved. I understand the deep concern of educational institutions, especially of the higher order, when racism, sexism or religious intolerance rears its ugly head. (I do not mean to disparage the other targets of hate that also infect campus life; assume that I use race, gender and religion as shorthand for all of the intolerances which humanoids vent on other humanoids).

Let me start with the inappropriateness of the fora in which these battles are usually fought—the courts. I cannot imagine a worse group of procurators of a nation's speech than a group of judges. I certainly cannot imagine a worse group to balance the freedom of thought and action that a university ought to instill and *encourage* against the order and community that a university or college must *maintain* to function properly. Judges—appropriately isolated from the political and even intellectual winds that blow, disciplined to curb their passions about all causes, large or small, accustomed to rigidly narrow forms of expression in their opinions and other writings, obliged to remain aloof from much human contact and intercourse, and suspicious of anything that upsets the *status quo*—are hardly the people to determine the boundaries needed to ensure freedom *and* order on campus. I am relieved that the judges have opted for freedom as often as they have, but they have provided precious little help to the administrators who must figure out what to do with the racists and other intolerants that creep into the campus communities.

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[4] *R.A.V.*, 112 S. Ct. at 2560.

[5] See The UWM Post, Inc. v. Board of Regents of Univ. of Wisconsin Sys., 774 F. Supp. 1163 (E.D. Wis. 1991).

[6] *Id.* at 1181.

With apologies to the exceptions about which I may not know, I cannot name a single judge who has ever successfully led a university to greatness. Baseball commissioners, yes, but university administrators? The bench is not the place to look for that kind of person. It follows that judges will not manage this particularly delicate aspect of university business very well.

The choice of fora is, of course, dictated by the means selected to solve the problem. Codes—rules, regulations, laws—are totally unsuited to the task at hand. Children are neither raised successfully by laws, nor educated successfully that way. Especially in this delicate concern of the things they say and write, children are not going to be molded by some black-letter rules. No, the task is much harder, and requires much more subtle tools.

First, the institution is entitled to, indeed must, identify itself. Entering students should be told what is expected of them. Society should not assign to educational institutions the task of educating Ku Klux Klanners out of their robes. To the extent that universities have selection options and policies, a statement of principle about the need for a tolerant community of scholars is necessary and proper. To the extent that an institution is not afforded that luxury by its state legislature, it has a harder monitoring task, but one that is achievable. The key to that monitoring is not to use sanctions to "punish" transgressors, but rather to protect the university community in its functions. Does anybody here doubt that an institution has the power to expel a student who destroys property, or does not pay tuition, or does not take examinations? Hate transgressors must be perceived in the same light. If a student makes it impossible for the college or university to perform its function, it matters little what kind of conduct is causing the difficulty—or what the motivation. It is this sense of *R.A.V.* that may prove useful: The institution is entitled to protect its capacity to function. Even courts understand that.

What kind of rules or "codes" are needed for such a regimen? Not very extensive ones. Such rules should avoid a description of the offensive conduct in terms of race or religion or the "et ceteras." They should describe instead the proscribed effects that conduct must avoid. Colleges and universities need not tolerate property destructors because of what they do to the university. They do not have to tolerate intimidators, for the same reason. This must be the thrust of campus rules and codes. People who intimidate others are excludable people, whether the intimidation is grounded in race, size, or gender. The more "highfalutin" the language of such rules about the need for a tolerant society and the intellectual offensiveness of racism, the more likely that the rules will not be useful except through court proceedings, where the rules will be struck down. The more such rules talk in utilitarian terms about the functioning of the institution, the less likely the rules will ever have to be defended in the first place. The more institutions exercise their screening potential, the more likely that rules will not be used at all.

I understand the desire of college and university lawyers for something more concrete and "black-letter" than the ephemeral guidance I here provide. In that sense, college and university lawyers differ little from the movie-house owners that I used to represent. They wanted concrete rules concerning what movies they could show without arousing the Chicago censors.

When we succeeded in striking down the ordinances that licensed movies on the basis of their content, not all of my clients were pleased. Now they had to rely on their own judgment to avoid the prosecutions for obscenity with which they were occasionally threatened. But that is the stuff of the First Amendment clay with which college and university attorneys work. One seeking black-letter law should go into probate work. Lawyers wishing to continue the creative work of representing creative institutions with creative students must expect to continue to be offered ephemeral advice on how to avoid overbreadth, underbreadth and all the variations in between. Somehow these lawyers will have to identify their institutions as places where people and ideas are judged on the merits—not on slogans.

Milton's beautiful *Areopagitica* suffers from one defect that has made it difficult to quote as a literal answer to either the advocates of censorship or to those who want clear rules of the game. When Milton assured us that truth conquers falsehood in a fair encounter, he should have acknowledged how long it takes and how impatient some of the advocates of truth become.

Watch your breadth.

V. SELECTED NACUA CONFERENCE OUTLINES

DISCIPLINING THE STUDENT

October 28, 1988

John G. Hill, Jr.
Marquette University
Milwaukee, Wisconsin

I. Essentially an Educational Process

1. As such, it is a function of the Student Affairs Office, not the lawyer.

2. The lawyer's job is to insure that the procedures are adequate, and that they are followed.

II. Legal Adequacy - Procedural Due Process

1. Difference Between Public and Independent Institutions.

Guillary v. Administators of Tulane University, 203 F. Supp. 855 (1962); Powe v. Miles, 287 F. Supp. 535 (1968); Albert v. Carovano (C.A.N.Y.) N. 87-7111, 1988.

These cases indicate that non-public colleges and universities are not bound by 14th amendment. As a practical matter, however, internal imperatives usually mandate the voluntary adoption of these protections.

2. Historical Background.

   a. Thomas Jefferson and the University of Virginia.
   b. Concept of in loco parentis.
   c. The Contract Theory. Anthony v. Syracruse University, 223 N.Y.C. 796 (1927).

III. The Dixon Case

Dixon v. Alabama State Board of Education, 186 F. Supp. 952 (1960) and 294 F.2d 155 (1961).

1. Factual Background.
2. Judicial Concept of State action.

IV. The Basic Elements of Due Process.

Esteban v. Central Missouri State College, 290 F. Supp. 622 (1969) and 415 F.2d 1077 (1969).

1. Factual Background.
2. Notice in Writing.
3. Fair Hearing. *Winnick v. Manning*, 460 F.2d 545 (1972).
4. Substantial Evidence.
5. No Requirement for Counsel, Cross Examination; etc.
6. The Concept of Reasonableness.

V. The Necessity for Written Rules and Procedures

1. The Student Handbook as a Contract.

Lyons v. Salve Regina College, 422 F. Supp 1354 (1976)
Zumbrun v. U.S.C., 101 Cal. Reporter 499 (1972).

2. There should be provisions stating examples of proscribed behavior, but specifically labeled non-exhaustive for all types of misconduct.

Page 3 - Role of Counsel in Handbook preparation.

Lex Collegii, Vol. 6, No. 2. Fall, 1982.

VI. The Troubled Student

Suggested Provision for Student Handbook.

> There are occasional, exceptional situations where a student's physical or psychological condition is sufficiently severe that action need be taken to withdraw the student from the University. The action could occur, for instance, if in the judgment of the University the conditions were such that the student could not benefit from the academic program; or could not benefit from the available and limited therapeutic resources of the University; or if the student were threatening to self and/or others; or were of disruptive concern to others.

> The intent of the policy is to be helpful to the affected student who appears not able to function effectively in the University Community for medical or psychological reason without infringing on the rights of others in the University Community. It is also the intent of this policy to provide the mechanisms to enable a student to take steps as to possibly continue toward the successful completion of his/her academic goals, if not immediately, then in the future.

See also Lex Collegii, Vol. 6, No. 4, Spring 1983.

VII. Emergency Discipline

One approach is to act to suspend or move a student off-campus pending a hearing. There is a clear and present danger to the student or others.

VIII. Off Campus Conduct

1. This depends on the Rules

One approach:

> The University reserves the right to investigate and subsequently take University action for behavior of the University students in selected non-University off-campus situations when such behavior is believed to have an impact on the University Community, e.g., alleged instances of criminal activity commencing on-campus but relocated off-campus or vice versa; off-campus harassment of or assault on a University person; criminal activity involving a student member of a University-sponsored organization whether perpetrated as a member of the organization or as an individual.

DISCIPLINING THE STUDENT IN PUBLIC HIGHER EDUCATION

October 28-29, 1988

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I. PUBLIC/PRIVATE DICHOTOMY:[1]

A. STATE ACTION: There must be "state action" to apply federal constitutional guarantees. Generally, where a public entity or public regulations have not dictated, coerced, or significantly encouraged the action of the private entity, private action may not be deemed to be state action, merely because the state generally regulates the private entity, and acquiesces in the challenged action. See, Tarkanian v. NCAA, 741 P.2d 1345 (1987) [Although this case involved suspension of a public employee (UNLV's basketball coach), the court stated that the action of a private university in response to enforcement of NCAA rules is not state action, where it is not shown that public collegiate member of the NCAA acted in concert to command the challenged result].

1. DELEGATED POWER THEORY: The private entity acts as a governmental agent in performing a particular task delegated to it by government. In Powe v. Miles, 407 F. 2d 73 (2d Cir. 1968), New York contracted with Alfred University to operate a state ceramics school and enacted a statute stating that any disciplinary action against ceramics students would be considered to be taken on behalf of the state. In Albert v. Carovano, 824 F.2d 1333 (2d Cir. 1987), the court found that Hamilton College engaged in state action by promulgating disciplinary rules in compliance with a state mandate requiring all chartered colleges to do so in order to qualify for state aid.

2. PUBLIC FUNCTION THEORY: The private entity performs a function that is generally considered the responsibility of government. The relevant question is whether the function performed has been "traditionally the exclusive prerogative of the state." Jackson v. Metropolitan Edison Co., 419 US 345, 353 (1974). Education has never been a state monopoly in the United States. Greenya v. George Washington University, 512 F.2d 556 (D.C. Cir. 1975) [neither granting of corporate charter by state nor tax exemption sufficient]; see also, Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973), cert. denied, 423 U.S. 995 [accreditation of academic programs not sufficient].

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[1] See generally, Kaplin, The Law of Higher Education, 2d ed. (1985), sec. 1.4 (pgs. 16-27).

3. GOVERNMENTAL CONTACTS THEORY: The private entity obtains substantial resources, prestige, or encouragement from its contacts with government. The focus is on less formal and particularized relationships between government and private entities. See, e.g., Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) [joint venturer in segregated coffee shop operated in public parking building]; Blackburn v. Fisk University, 443 F2d 121 (6th Cir. 1971) [suspension of students without a hearing not state action simply because of private university's tax exempt status].

B. OTHER BASES FOR STUDENT LEGAL RIGHTS:

1. STATE CONSTITUTIONS: In State v. Schmid, 423 A.2d 615 (N.J. 1980), a nonstudent had been charged with criminal trespass for distributing political material on Princeton University's campus in violation of university regulations. The New Jersey court held (even without a finding of state action) that Princeton had a state constitutional obligation to protect expressional rights. See, Prune Yard Shopping Center v. Robins, 593 P.2d 341 (Cal. 1979), aff'd 447 U.S. (1980); Blair v. Washington State University, 108 Wn.2d 558, 740 P.2d 1379 (1987) [held Washington state's Equal Rights Amendment prohibited sex-based classifications in intercollegiate athletics].

2. STATUTORY RIGHTS: The Civil Rights Restoration Act of 1987 [P.L. 100-259] expands the scope of federal civil rights laws[2] to cover all institutional programs if the institution receives any federal financial assistance. Students also have rights to the protection of "educational records" under the Family Educational Rights and Privacy Act (the Buckley Amendment). 20 U.S.C. 1232g; 34 C.F.R. sec. 99.

3. COMMON LAW: Express/implied contract.

II. AUTHORITY TO DISCIPLINE STUDENTS:

A. CONSTITUTIONAL: In Goldberg v. Regents of the University of California, 248 Cal.App.2d 867, 57 Cal.Rptr. 463, 468 (1967), the court found broad disciplinary authority over students to be implicit in the state constitution's grant of power to the university: "The Regents have the general rule-making or policy-making power in regard to the University ... and are ... fully empowered with respect to the organization and government of the University ..., including the authority to maintain order and decorum on the campus and the enforcement of the same by all appropriate means, including suspension or dismissal from the University."

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[2] Title IX (sex); Title VI (race, color or national origin); Section 504 (handicap); Age Discrimination Act of 1975. See e.g., Esteban v. Central Missouri State College, 290 F.Supp. 622 (W.D.Mo.1968); 415 F.2d 1077 (8th Cir. 1969) [brought under 42 USC 1983 ("color of law")]; Branden v. University of Pittsburgh, 343 F.Supp. 836, rev'd 477 F.2d 1, on remand, 392 F.Supp. 188 (W.D.Penn. 1975) [sex discrimination found against private university under 1983].

B. STATUTORY: For example, Evergreen's board of trustees has "full control" of the college and "may promulgate such rules and regulations" it deems necessary. RCW 28B.40.120 (1)&(12).

C. CONTRACTUAL: Courts have upheld harsh and vague regulations in an institution's favor based on an implied contract and have accorded institutions considerable latitude to select, interpret and change their contract terms to which students are subjected as they progress through the institution. See, e.g.,Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1979)

1. PRIVATE INSTITUTIONS: In affirming the dismissal of students for having participated in a civil marriage ceremony, the court in Carr v. St. John's University, 17 A.D.2d 632, 231 N.Y.S. 2d 410, aff'd, 12 N.Y. 2d 802, 187 N.E.2d 18 (1962), stated, "when a student is duly admitted by a private university, secular or religious, there is an implied contract between the student and the university that, if he complies with the terms prescribed by the university, he will obtain the degree which he sought." The regulation involved provided that "in conformity with the ideals of Christian education and conduct, the university reserves the right to dismiss a student at any time on whatever grounds the university judges advisable."

2. PUBLIC INSTITUTIONS: In district court in Esteban v. Central Missouri State College, 290 F.Supp. 622 (W.D.Mo. 1968), aff'd, 415 F.2d 1077 (8th Cir. 1969) stated:

"The voluntary attendance of a student in educational institutions of higher learning is a voluntary entrance into the academic community. By such voluntary entrance, the student voluntarily assumes obligations of performance and behavior reasonable imposed by the institution of choice relevant to its lawful missions, processes, and functions. These obligations are generally much higher than those imposed on all citizens by the civil and criminal law. So long as there is no invidious discrimination, no deprival of due process, no abridgement of a right protected in the circumstances, and no capricious, clearly unreasonable or unlawful action employed, the institution may discipline students to secure compliance with these higher obligations as a teaching method or to sever the student from the academic community." 290 F.Supp. at 631; see also, Healy v. Larsson, 323 N.Y.S. 2d 625, aff'd, 35 N.Y. 2d 653, 318 N.E. 2d 608 (1971) [applying the Carr principle to public institutions].

D. INHERENT: The circuit court in Esteban held that the college had "inherent authority to maintain order and to discipline students ... to promulgate rules ... to protect itself and property...." 415 F.2d 1077, 1088-1089 (8th Cir. 1969). In Morris v. Nowotny, 323 S.W. 2d 301 (Tex. 1959), the court remarked that the statutes establishing the University of Texas "imply the power, and, if they do not so imply, then the power is inherent in university officials to maintain proper order and decorum on the premises of the university." However, a college cannot simply rely on the argument that there is no constitutional right to higher education to justify its failure to provide students with basic due process. Dixon v. Alabama State Board of Education, 294 F.2d 150, 156-157 (5th Cir. 1961), cert. denied 368 U.S. 930 [expulsion of black civil rights protesters without any notice, hearing or appeal, although hearings were typical]. The constitutionally protected property right involved is in the student's continued enrollment. Regents of the University of Michigan v. Ewing, 106 S.Ct. 507 (1985); see Dixon, 294 F.2d at 157.

III. SUBSTANTIVE DUE PROCESS: The purpose and the application of student disciplinary regulations must meet the reasonableness test and comply with constitutional due process requirements concerning vagueness, overbreadth and fairness.

A. VAGUENESS[3]: Standard of conduct must be expressed in reasonably clear and narrow rules calculated to give adequate notice of the behavior expected of students. A rule will likely pass judicial scrutiny if the standard "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Sword v. Fox, 446 F.2d 1091 (4th Cir. 1971) [upholding a regulation that "demonstrations are forbidden in any areas of the health center, inside any buildings, and congregating in the locations of fire hydrants."]

1. In Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969), the University of Wisconsin expelled students for "misconduct" and violating university policies[4] in blocking access to an off-campus recruiter. Rather than challenge the district court's ruling that the policies were unconstitutional by reason of overbreadth, the University argued it had inherent power to discipline students for misconduct without the necessity of relying on a preexisting specific rule of conduct. In ruling that the misconduct policy was unconstitutionally vague, the circuit court stated: "No one disputes the power of the University to protect itself by means of disciplinary action against disruptive students. ... Power alone does not supply the standards needed to determine its application to types of behavior or specific instances of 'misconduct'. ... It contains no clues which could assist a student, an administrator or a reviewing judge in determining whether conduct not transgressing statutes is susceptible to punishment by the University as 'misconduct'. ... Pursuant to appropriate rule or regulation, the university has the power to maintain order by suspension or expulsion of disruptive students. Requiring that such sanctions be administered in accord with preexisting rules does not place an unwarranted burden upon university administration. We do not require

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[3] "Most university rules subjected to judicial tests of vagueness have survived, sometimes because the rule at issue is less egregious than the 'misconduct' rule in Soglin, sometimes because a court accepts the "inherent power to discipline" argument and declines to undertake any real vagueness analysis, and sometimes because the student conduct at issue was so contrary to the judges' own standards of decency that they tended to ignore the defects in the rules in light of the obvious 'defect' in behavior." Kaplin, The Law of Higher Education, 2d ed. (1985), at 293.

[4] The policies provided that students may support causes by lawful means that do not disrupt university operations.

(1969) [students suspended or dismissed on specific charge they threatened or pushed state official, misappropriated state equipment, or blocked entrances not vague].

B. OVERBREADTH: Student codes must not be drawn so broadly and vaguely as to include protected First Amendment[7] activity along with behavior subject to legitimate regulation. While institutions should be forums for the free expression of ideas, reasonable restrictions on freedoms of speech and assembly have been upheld where necessary to maintain good order and proper decorum. See ACLU v. Board of Education, 59 Cal.2d 203, 212, 28 Cal. Rptr. 700, 379 P.2d 4 (1963)[upheld school board's requirement that groups wanting to use premises state that it would not knowingly be used in an illegal manner]. Conduct, even though intertwined with expression and association is subject to regulation. See, e.g., Adderley v. Florida 385 U.S. 39 (1966) [upholding Florida's criminal trespass law].

C. FUNDAMENTAL FAIRNESS: Student conduct codes cannot arbitrarily discriminate in the range and type of penalties, or in the procedural safeguards, afforded various classes of offenders. In Paine v. Board of Regents of the University of Texas System, 355 F. Supp. 199 (W.D. Tex. 1972), aff'd per curiam, 474 F.2d 1397 (5th Cir. 1973), the University treated students convicted of drug offenses differently from all other code offenders, including those charged with equally serious offenses, giving them a harsher penalty and fewer procedural safeguards. The court found this differential treatment to violate the equal protection and due process clauses.

IV. PROCEDURAL DUE PROCESS REQUIREMENTS: The Due Process Clause of the Fourteenth Amendment requires notice and some opportunity for hearing before students at a tax-supported college are suspended or expelled for misconduct. Dixon, 294 F.2d 150 (5th Cir. 1961); Goss v. Lopez, 419 U.S. 565 (1975).[8] The standards of procedural due process are not absolutes but "depend upon the circumstances and the interests of the parties involved."

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[7] "Obviously, one does not lose his first amendment rights by matriculation at a college." Esteban 415 F.2d at 1085 (1969).

[8] In Goss, the court held that a high school student faced with a suspension of less than ten days is entitled to "oral or written notice of the charges against him and, if he denies them, and explanation of the evidence the authorities have and an opportunity to present his side of the story." In Esteban, the court stated that "lesser disciplinary procedures, including but not limited to guidance counseling, reprimand, suspension of social or academic privileges, probation, restriction to campus and dismissal with leave to apply for readmission, ... should not be required to conform to federal processes of criminal law, ... [which] would frustrate the teaching process and render the institutional control impotent." 290 F.Supp. at 629.

university codes of conduct to satisfy the same rigorous standards as criminal statutes. We only hold that expulsion and prolonged suspension may not be imposed on students by a university simply on the basis of allegations of 'misconduct' without reference to any preexisting rule which supplies an adequate guide." 418 F.2d at 167-68.

2. In Esteban v. Central Missouri State College, 290 F.Supp. 622 (W.D.Mo. 1968), aff'd, 415 F.2d 1077 (8th Cir. 1969)[5], students contested their suspension under a regulation prohibiting participation in "unruly" mass gatherings. The students argued that the rules were void as being beyond the powers of the college to prohibit conduct that was not otherwise illegal. The students also relied on criminal cases concerning the "void for vagueness doctrine" in arguing that the regulations were too vague and indefinite to be enforceable. In rejecting these arguments, the district court stated: "The legal doctrine that a prohibitory statute is void if it is overly broad or unconstitutionally broad does not, in the absence of exceptional circumstances, apply to standards of student conduct." Id., at 630. The district and circuit courts recognized the institution's latitude and discretion in its formulation of rules and regulations and questioned whether published standards are necessary to advise students that he cannot engage in conduct that violates "plain common sense."[6] See also, Jenkins v. Louisiana State Board of Education, 506 F.2d 992 (5th Cir. 1975) [upholding regulations dealing with disorderly assembly and disturbing the peace on campus]; Scott v. Alabama State Board of Education, 300 F.Supp. 163

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[5] The Soglin court noted: "To the extent that Esteban v. Central Missouri State College, 290 F.Supp. 622, 630 (W.D.Mo. 1968), affirmed, 415 F.2d 1077 (8th Cir. 1969), refuses to apply standards of vagueness and overbreadth required of universities by the Fourteenth Amendment we decline to follow it." 418 F.2d at 168; see also, Esteban 415 F2d at 1089 [disagreeing with the district court's ruling in Soglin]. It should be noted that in Soglin the students were suspended pending a hearing while in Esteban the district court previously directed that the students be given a new hearing. For the details, see Esteban v. Central Missouri State College, 277 F.Supp. 649 (1967).

[6] "Is a published (oral or written) standard necessary to advise a student he cannot cheat on exams, keep other students out of their classroom, strike a professor, talk loudly in class during the recitation of others, come to class in a bathing suit, curse his professor in the classroom, engage in disruptive mob action?" 290 F.Supp., at 630 (n. 8); see also, Esteban 415 F.2d at 1089 [describing what behavior students should already be expected to know: "College attendance, whether it be a right or a privilege, very definitely entails responsibility. This is fundamental. It rests upon the fact that the student is approaching maturity. His elementary and secondary education is behind him. He already knows, or should know, the basics of decent conduct, of nonviolence, and of respect for the rights of others. He already knows, or should know, that destruction of property, threats to others, frightening passersby, and intrusions upon their rights of travel are unacceptable, if not illegal, and are not worthy of one who would pursue knowledge at the college level".]

Dixon, 294 F.2d at 155.[9] The due process clause does not require a public institution of higher learning to turn its classrooms into courtrooms. Ewing, 106 S.Ct. 507 (1985). Any penalty that deprives the student of substantial educational benefits or seriously affects his reputation and employment prospects is, under Goss, arguably subject to at least the "rudimentary" protection of due process. Refer to your state administrative procedure acts.

A. NOTICE: The notice should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the institution. Dixon, 294 F.2d at 158. Students should be given the names of the witnesses against him[10] and an oral or written report of the facts to which each witness testifies.

1. SCOPE: Notice should be given of both the conduct with which the student is charged and the rule or policy which allegedly proscribes that conduct. The notice should contain a statement of "specific charges and grounds". Dixon, 294 F.2d at 158. The charges need not be drawn with the specificity of a criminal indictment, but they should be "in sufficient detail to fairly enable ... [the student] to present a defense" at the hearing Jenkins v. Louisiana State Board of Education, 506 F.2d 992, 1000 (5th Cir. 1975). While a student cannot be punished on the basis of some ground other than that stated in the written charge, factual allegations not enumerated in the notice may be developed at the hearing if the student could reasonable have expected them to be included.

2. TIME: There is no clear constitutional requirement concerning how much advance notice the student must have of the charges. As little as two days before the hearing has been held adequate. Jones v. Tennessee State Board of Education, 279 F.Supp. 190 (M.D. Tenn. 1968), affirmed, 407 F.2d 834 (6th Cir. 1969). In Esteban the district court directed the school to provide a written statement of the charges, for each student, at least ten days before the hearing. 277 F.Supp. 649 (1967); See also RCW 28B.19.120 (10 days).

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[9] For example, courts generally treat suspensions and dismissals for cheating as non-academic disciplinary proceedings requiting higher due process than with pure academic issues. See generally, Roberts, "Public University Responses to Academic Dishonesty: Disciplinary or Academic," 15 J.Law & Ed. 369 (1968) [recommends classifying academic dishonesty as a violation of academic standards based on perceived judicial restraint]. Academic dismissal proceedings may even be ad hoc. See, Haberle v. University of Alabama at Birmingham, 803 F.2d 1536 (11th Cir. 1986).

[10] In a recent Sixth Circuit case, a high school student who was threatened with expulsion based on statements of other students as to his alleged drug-trafficking activities did not have a due process right to learn these other student's identities. A school administrator had already assessed their credibility and disclosure might result in reprisals. Newsome v. Batavia Local School Dist., (C.A. Ohio) No. 87-3091 (March 30, 1988).

B. HEARING[11]: The nature of the hearing should vary depending upon the circumstances of the particular case. Dixon, 294 F.2d at 158. There is no right to trial by jury. Even a "full-dress hearing, with the right to cross-examine witnesses," may not be required. Id., at 159. Nevertheless, an institution should provide increasingly more formal and comprehensive due process procedures as the severity of the potential penalty increases and should gear its procedures to the maximum penalty that can be meted out in each type of proceeding it authorizes. The minimum requirement is that the hearing provide students with an opportunity to speak in their own defense and explain their side of the story. Students who are subject to lengthy suspensions or to expulsion may be entitled to more formal procedures, including a hearing before the person(s) having power to expel or suspend with a right to cross-examine the witnesses against them. Esteban, 277 F.Supp. 649 (W.D. Mo. 1967); Goss v. Lopez, 419 U.S. 565 (1975).

1. CHECKLIST: In Esteban, 277 F.Supp. 649 (1967) the district court held that the students had not been accorded procedural due process and directed the college to provide the following:

a. WRITTEN CHARGES: A written statement of the charges, for each student, made available at least ten days before the hearing;

b. ADVANCE INSPECTION: Advance inspection of any affidavits or exhibits the college intends to submit at the hearing[12];

c. COUNSEL: The right to bring counsel to the hearing to advise them (but not question witnesses)[13];

d. DEFENSE: The opportunity to present their own version of the facts, by personal statements as well as affidavits and witnesses[14];

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[11] Private schools have more flexibility since the relationship between the institution and the student is primarily contractual. For example, in Stone v. Cornell University, 510 NYS2d 313 (1987), a student was expelled without a hearing based on an agreed code of conduct specifying that drug possession would be grounds for immediate dismissal.

[12] The court in Dixon suggested that "the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies." 294 F.2d at 159.

[13] Although students have not been determined to have a constitutional right to full legal representation in University disciplinary hearings, some courts have required institutions to allow students to have professional lawyers present to advise them during the disciplinary hearings. Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978). Other courts have ruled that students do not have the right to have legal counsel present at his/her hearing. See, e.g., Gorman v. University of Rhode Island, 646 F.Supp. 799 (1986).

e. HEAR EVIDENCE AND QUESTION WITNESSES: The right to hear evidence against them and question (personally, not through counsel) adverse witnesses[15];

f. DECISION BASED SOLELY ON EVIDENCE: A determination of the facts of each case by the hearing officer solely on the basis of the evidence presented at the hearing;

g. WRITTEN FINDINGS OF FACT: A written statement of the hearing officer's findings of fact; and

h. RECORD:[16] The right, at their own expense, to make a record of the hearing.

2. OPEN OR CLOSED: Subject to state administrative law, the institution has the discretion to close or partially close the hearing or to leave the choice to the accused student.

3. RULES OF EVIDENCE: Formal rules of evidence need not be followed. Testimony containing hearsay may be heard, if relevant. The decision depends upon whether there are circumstances indicating the reliability of the evidence and whether it is the best evidence reasonable available. See, e.g., Nisqually Delta Assoc. v. Du Pont, 103 Wn.2d 720

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[14] Students in disciplinary proceedings may be directed to answer questions concerning their conduct. Students who refuse to answer on grounds of the Fifth Amendment privilege may be informed that the hearing panel could draw negative inferences from their refusal which might result in their suspension or dismissal. If the student then elects to answer, his statements could not be used against him in either state or federal court. See Furutani v. Ewigleben, 297 F. Supp. 1163 (N.D. Cal. 1969); see also Garrity v. New Jersey, 385 U.S. 493 (1967); see generally, Pavela, "Limiting the 'Pursuit of Perfect Justice' on Campus: A Proposed Code of Student Conduct", 6 J.C.& U.L. 137, 153 [n. 10] (1979).

[15] Internal subpoenas may be desirable, since cases have arisen in which complainants or respondents were unable to present an effective case due to the indifference and lethargy of potential witnesses. This option may also be available under your state administrative procedure act. See, e.g., RCW 28B.19.120 (10)(b).

[16] In Gorman v. University of Rhode Island, 646 F.Supp. 799 (1986), the court held that the student was deprived of procedural due process by not being allowed to tape record his disciplinary hearing at his own expense. It should be noted that the case file consists of materials which would be considered "education records", pursuant to the Family Education Rights and Privacy Act. Personal notes of University staff members or complaints are not included. See, Pavela, "Limiting the 'Pursuit of Perfect Justice' on Campus: A Proposed Code of Student Conduct," 6 J.C.& U.L. 137, 158 [n. 30] (1979).

(1985); Fain v. Brooklyn College of City University, 493 NYS2d 13 (1985) ["Surmise, conjecture and speculation does not give rise to substantial evidence."]; see, generally, Pavela, "Limiting the ‘Pursuit of Perfect Justice" on Campus: A Proposed Code of Student Conduct," 6 J.C. & U.L. 137, 158 [n. 35] (1979).

4. IMPARTIAL HEARING BOARD: Generally, the student must show malice, bias, or conflict of interest on the part of the hearing officer or panel member before a court will make a finding of partiality. The term "personal bias" involves animosity toward a party or favoritism toward the opposite party. See generally, Davis, Administrative Law Treatise, "Bias," Section 12.03. In Gorman v. University of Rhode Island, 646 F.Supp. 799 (1986), the court found that the student was denied his right to an independent and impartial adjudicator because of undue influence by the board advisor who also was the acting student life director. But see, Beaver v. Ortenzi, 524 A.2d 1022 (1987) [holding that the commingling of prosecutorial and adjudicatory functions in a disciplinary hearing did not violate due process in this particular case]. State administrative procedure acts often include provisions prohibiting most ex parte contact. See, e.g., RCW 28B.19.140.

a. In Blanton v. State University of New York, 489 F.2d 377 (2d Cir. 1973), the court held that - at least where students had a right of appeal - due process was not violated when a dean who had witnessed the incident at issue also sat on the hearing committee.

b. In Jones v. Tennessee State Board of Education, 279 F.Supp. 190 (M.D. Tenn. 1968), affirmed, 407 F.2d 834 (6th Cir. 1969), the court even permitted a member of the hearing committee to give evidence against the accused student, in the absence of proof of malice or personal interest.

5. TIMING/EMERGENCY DISCIPLINE: Normally the hearing must occur before the suspension or expulsion goes into effect.

a. In Stricklin v. Regents of University of Wisconsin, 297 F. Supp. 416 (W.D. Wis. 1969), the court limited the use of interim suspensions, pending a final decision, to situations where "the appropriate university authority has reasonable cause to believe that danger will be present if a student is permitted to remain on campus pending a decision following a full hearing." The court noted that "an interim suspension may not be imposed without a prior preliminary hearing, unless it can be shown that it is impossible or unreasonably difficult to accord it prior to an interim suspension," in which case "procedural due process requires that ... [the student] be provided such preliminary hearing at the earliest practical time." These requirements would protect a student from being "suspended in ex parte proceedings ... without any opportunity, however brief and however limited, to persuade the suspending authority that there is a case of mistaken identity or that there was extreme provocation or that there is some other compelling justification for withholding or terminating the interim suspension."

b. In Goss, the court stated: "As a general rule notice and hearing should precede removal of the student from school. We agree..., however, that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school ... [and notice and hearing] should follow as soon as practicable." 419 U.S. at 583 (1975); see also, Dixon 294 F.2d at 157 [recognizing immediate danger to the public or peril to national security.] However, "there must be more than mere fear and apprehension of possible disturbance." Esteban, 415 F.2d at 1087; see, Tinker v. Des Moines Ind. School Dist., 393 U.S. 503 (1969). In Rosenfeld v. Ketter, 820 F.2d 38 (2d Cir. 1987) a student at SUNY-Buffalo forewarned an administrator of a protest. The student was told that he would be arrested if he violated a valid campus rule. The student was arrested for criminal trespass and temporarily suspended. The court held that the student was not deprived of due process.

6. BURDEN OF PROOF: The civil "preponderance of the evidence" standard is the appropriate burden of proof in a disciplinary hearing even if the student is also charged with criminal conduct[17].

C. SUBSTANTIAL COMPLIANCE:

1. FOLLOW THE RULES: Whenever an institution has established procedures that apply to the imposition of sanctions, the law will usually require that they be followed. In Woody v. Burns, 188 So. 2d 56 (Fla. 1966), for example, the court invalidated an expulsion from a public institution because a faculty committee had "circumvented ... [the] duly authorized [disciplinary] committee and arrogated unto itself the authority of imposing its own penalty for appellant's misconduct." In Tedeschi v. Wagner College, 49 N.Y.2d 652, 404 N.E. 2d 1302 (1980), the court invalidated a suspension from a private institution, holding that "when a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion, that procedure must be

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[17] By definition, a criminal action is on action by the sovereign against one charged with the commission of a criminal act, for the enforcement of the penalty or punishment prescribed by law. 1 Am. Jur. 2d. Actions 43. The court in Esteban rejected the analogy of student discipline to criminal proceedings stating, "For, while the expelled student may suffer damaging effects, ... he or she may not be imprisoned, fined, disenfranchised, or subjected to probationary supervision." Esteban, 290 F.Supp. at 628 (1968). Since a college or university charges students with violations of administrative codes of conduct, not with criminal conduct per se, the civil standard applies. See, Berstein v. Real Estate Commission, 221 Md. 221 (1959) [establishing the "preponderance" standard for state administrative proceedings]; see also 9 Wigmore on Evidence 2498 (3rd Ed. 1940); see generally, Long, "The Standard of Proof in Student Disciplinary Cases," 12 J.C.& U.L. 71 (1985)[discussing "beyond a reasonable doubt", "preponderance" and "clear and convincing" standards].

substantially observed."

2. EXCEPTIONS:

a. WAIVERS: Waivers are more successful with private institutions whose relationship with students is primarily contractual. See, e.g., Stone v. Cornell University, 510 NYS2d 313 (1987). In Yench v. Stockmar, 483 F.2d 820 (10th Cir. 1973), the student neither requested that the published procedures be followed nor objected when they were not. Public institutions should be careful since courts in other contexts have refused to recognize waivers as contrary to public policy.
In Dixon the court stated: "The State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process." 294 F.2d at 156.

b. HARMLESS ERROR: Deviations from prescribed procedures do not necessarily invalidate a decision or proceeding, unless significant prejudice to a student or the institution results. In Board of Curators, University of Missouri v. Horowitz, 435 U.S. 78, 92, (1978) the Supreme Court rejected the theory that state schools are bound by principles of federal administrative law requiring agencies to follow their own regulations. See generally, "Violations by Agencies of Their Own Regulations," 87 Harvard Law Review 629 (1974). In Winnick v. Manning, 460 F.2d 545 (2d Cir. 1972), the student contested the school's use of a panel other than that required by the rules, but the court held that the "deviations were minor ones and did not affect the fundamental fairness of the hearing."

V. THE TROUBLED STUDENT[18]:

A. SECTION 504 CONSIDERATIONS: Special care needs to be taken if any relationship exists between the misconduct and the handicap. In Southeastern Community College v. Davis, 442 U.S. 397 (1979), the U.S. Supreme Court stated that "Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person." See, e.g., Doe v. New York University, 666 F.2d 761 (2nd Cir., 1981) [university had not violated Section 504 when it denied readmission to a woman with a long history of "borderline personality" disorders.]; Puskin v. Regents of the University of Colorado, 658 F.2d 1372 (10th Cir. 1981) [a medical doctor suffering from multiple sclerosis had been wrongfully denied admission to the university's psychiatric residency program]. Ask if the student would have been disciplined in spite of his/her handicap.

B. CONSTITUTIONAL ISSUES:

1. FIRST AMENDMENT: The legal challenge to psychiatric withdrawals is based on whether a student purportedly suffering from a

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[18] See, generally, Pavela, Dismissal of Students with Mental Disorders: Legal Issues, Policy Considerations and Alternative Responses.

mental disorder has engaged in behavior which indicated that he or she poses a threat to self or others, or is unable to meet other reasonable institutional requirements.

2. SPECIAL DUE PROCESS CONSIDERATIONS: The stigma associated with psychiatric labeling may constitute a deprivation of liberty. In order to require a student to submit to a psychiatric evaluation with possible future treatment there must be evidence of a serious psychological disorder that might give rise to a compelling state interest. See, Gorman v. University of Rhode Island, 646 F.Supp 799 (1986).

C. LIABILITY: Administrators would not be expected to determine whether any student might harm themselves or others without notice (e.g. a manifest threat, or a pattern of violent behavior). However, institutions have a duty to exercise due care to protect students from reasonably foreseeable attacks on campus. See, e.g., Tarasoff v. Regents of University of Calif., 551 P.2d 334 (Cal. 1976); Peterson v. State , 100 Wn.2d 421, 671 P.2d 230 (1983) [holding state psychiatrist has a duty to take reasonable precautions to protect any person who might foreseeably be endangered by his patient's mental problems.] In Eiseman v. State of New York, 70 NY2d 175, 518 NYS2d 608, 511 NE2d 1128 (1987), the New York Court of Appeals refused to impose liability upon SUNY-Buffalo for admitting an ex-convict under a special program who later raped and murdered a co-student and roommate off-campus. The court held that the law imposed no heightened duty of inquiry upon the College under the policies of that special program or of those promoting integration of former convicts into society. Id., at 191.

VI. OFF-CAMPUS CONDUCT[19]: Standards of student conduct "may apply to student behavior on and off the campus when relevant to any lawful mission, process, or function of the institution." Esteban 290 F.Supp. at 630. Most cases involve drugs, alcohol, or dangerous criminal activity which threaten campus safety. However, activities which pose no direct threat might be controlled to maintain good "town-gown" relations. But see, Dixon, 294 F.2d at 153 [testimony that civil rights demonstrations would bring discredit upon the school and be prejudicial to the school and the state].

A. CRIMINAL ACTIVITIES: Courts have consistently held that it is not proper to enjoin a university disciplinary hearing pending criminal charges. See, e.g., Hart v. Ferris State College, 557 F. Supp. 1379 (W.D. Mich. 1983)[20]; Nzuve v. Castleton State College, 133 Vt. 225, 335 A.2d 321 (1975)

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[19] See generally, Sutherland, "Bad Acts Off Campus: The Limits of Institutional Authority - Issues Relating to Students" [Outline from presentation given at 1988 annual NACUA conference]

[20] In Hart v. Ferris State College, 557 F. Supp. 1379 (W.D. Mich. 1983), a student who had been arrested for allegedly selling illegal drugs off campus sought a preliminary injunction against a college disciplinary hearing concerning her conduct. The student contended that holding the hearing prior to the final resolution of the criminal charges would violate her Constitutional rights to remain silent, to have effective counsel and to

[campus rape]; Goldberg v. Regents of University of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967). Institutions have the prerogative to determine if any unlawful possession of drugs or any criminal conduct, whether or not occurring on campus, on the part of students is detrimental to the institution's mission. See, e.g., Krasnow v. Virginia Polytechnic Institute, 551 F2d 591 (4th Cir. 1977); Pollnow v. Glennon, 594 F.Supp. 220, 224 (S.D.N.Y. 1984) [upheld high school student's suspension for assault committed outside of school]. In Cornette v. Aldridge, 408 S.W. 2d 935 (1966), the university suspended a student for off campus reckless driving based on a handbook provision that students are accepted only as responsible law-abiding adults.

B. NON CRIMINAL BUT OFFENSIVE: In Kusnir v. Leach, 439 A2d 223 (1982), college regulations against assault, harassment, personal abuse and trespass were violated when uninvited students entered a party at a private off-campus residence and were disorderly and disruptive. The Court rejected the students contention that the College lacked jurisdiction over off campus conduct stating the a College obviously has a vital interest in the character of its students and may regard off campus behavior as a reflection of a students fitness to be a member of the student body. See also, Esteban, 290 F.Supp. 622 (W.D.Mo. 1968), aff'd, 415 F2d 1077 (8th Cir. 1069).

C. INNOCENT ACTIVITIES: In Carr v. St. John's University, 17 A.D.2d 632, 231 NYS2d 410, Aff'd, 12 NY2d 802, 187 N.E.2d 18 (1962), the court upheld the dismissal of four students for off-campus conduct (i.e. participating in a civil marriage ceremony) under a regulation providing that "in conformity with the ideals of Christian education and conduct, the university reserves the right to dismiss a student at any time on whatever grounds the university judges advisable."

D. LIMITS: In the Paine v. Board of Regents, 355 F.Supp. 199 (W.D. Tex. 1972), aff'd, 474 F2d 1397 (5th Cir. 1972), the institution automatically suspended students who had been put on probation by the criminal courts for possession of marijuana. The court invalidated the suspensions partly because they were based on an off-campus occurrence (i.e. court probation) which did not automatically establish a threat to the institution. To avoid such problems, institutions should have preexisting rules addressing off-campus conduct that allow administrators to ascertain whether or not the conduct has a direct detrimental impact on the institution's educational functions before using that act as a basis for discipline.

VII. DRAFTING CONSIDERATIONS: Institutions are neither expected to develop disciplinary regulations which are written with the scope and precision of a

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proceed with criminal charges "first". The court rejected all of these claims and denied the request for a preliminary injunction.

criminal code nor subject to the rigors of commercial contract law[21]. See Esteban, 290 F.Supp. at 630 (1968); see generally, Pavela, "Limiting the 'Pursuit of Perfect Justice' on Campus: A Proposed Code of Student Conduct," 6 J.C.& U.L. 137 (1979).

A. RECOGNIZE THE IMPLICATIONS: Written rules should prevent legal problems by giving students fairer notice of what is expected from them and by limiting arbitrary administrative action ["double edged sword"]. Nevertheless, both students and administrators may oppose limits on their freedom/discretion.[22] Written rules also provide a target to aim at in a lawsuit.

B. UTILIZE FLEXIBILITY: A school has latitude and discretion in its formulation of rules and regulations establishing general standards of conduct. Esteban, 415 F.2d at 1088. The court in Esteban emphasized that, as to standards of conduct, "flexibility and elbow room are to be preferred over specificity." Id., at 1089. However, a public school cannot require a student to discard any constitutional right when he matriculates. Id. Disciplinary rules should provide standards sufficient to guide both the students in their conduct and the disciplinarians in their decision making. The rules must be fair and reasonable and neither discriminatory, arbitrary nor capricious. For example, simply prohibiting "misconduct" was found to be inadequate in Slogin v. Kauffman, 418 F.2d 163 (7th Cir. 1969). However, the U.S. Military Academy honor code [i.e. "A cadet will not lie, cheat, or steal nor tolerate those who do"] was found constitutional in White v. Knowlton, 361 F. Supp. 445 (S.D.N.Y. 1973). Further, explicitly state the burden of proof standard as "by a preponderance."

C. KEEP IT SIMPLE: Complicated procedural rules will neither serve the institution nor students. Avoid legalese. Adopt standards to guide student conduct which the institution is prepared to enforce and follow. Failure to enforce prohibitions or follow procedures could result in unnecessary liability and provide a fruitful vineyard for appeal. Under the contract theory, institutions may be bound to adhere to its published rules. It may be prudent to include a caveat in the rules stating that substantial compliance is sufficient and reserving authority to modify the requirements.[23]

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[21] The plaintiff in Slaughter v. Brigham Young University, 514 F.2d 622 (10th Cir. 1975) had been awarded $88,283 in damages in the trial court in a suit alleging erroneous dismissal from school. The appellate court reversed stating: "It is apparent that some elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the university to provide some framework into which to put the problem of expulsion for disciplinary reasons. This does not mean that 'contract law' must be rigidly applied in all its aspects, not is it so applied even when the contract analogy is extensively adopted ... The student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category." 514 F.2d at 676.

[22] The court in Esteban took judicial notice that "outstanding educational authorities in the field of higher education believe, on the basis of experience, that detailed codes of prohibited student conduct are provocative and should not be employed in higher education." 290 F.Supp. at 630.

D. KEEP THE PROCESS OPEN AND SEEK INPUT: While state administrative procedure acts call for prior publication of rules and meaningful opportunity to be heard, drafters should actively seek community input through public forums, notices in the student/campus newspaper, etc. Attempt to involve the entire campus community, especially faculty and students (via a task force), to encourage feedback and acknowledge that you value their opinions. According to Kaplin, "heavy student involvement in drafting may be valuable to ensure an expression of their 'common understanding' - but it would usually be wise to have a lawyer play a general advisory role in the process." Kaplin, supra, at 294. While openness is vital, so is control of the process. Avoid the administrative rule-making quagmire by: consolidating support from key administrators, faculty, staff and students; setting a time table; and facilitating quick responses to feedback.

E. FOLLOW RULE-MAKING PROCEDURES: It goes without saying that the institution should adhere to state statutes or administrative regulations specifying rule-making procedures. In Mull v. Oregon Institute of Technology, 538 P.2d 87 (Or. 1975), the court applied that state's administrative procedure statutes to a suspension for misconduct and remanded the case to the college with instructions to enter findings of fact and conclusions of law as required by one of the statutory provisions. Avoid any surprise "ripple effect" by carefully reviewing other institutional rules and policies which may be affected by a change in the student code. [utilize statute/code reviser].

F. WIDELY PUBLICIZE THE FINAL RULES[24]: Beyond the administrative rule-making requirements, any rules should be widely publicized. This includes catalogs, admissions material, special publications, etc. Beyond this, schedule several education and training sessions for administrators, faculty and students. Lastly, develop a guidebook that includes not only the code but answers to questions raised at the public meetings and sample forms (e.g. findings of fact; administrative subpoena).

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[23] In Dehaan v. Brandeis University, 150 F.Supp. 626 (D.Mass. 1957), the court upheld the plaintiff's suspension for misconduct under a policy where the (private) school "reserves the right to sever the connection of any student with the university for appropriate reason."

[24] In Slaughter v. Brigham Young University, 514 F.2d 622 (10th Cir. 1975), the court indicated that the university's findings would be accorded a presumption of correctness only "if the regulations concerned are reasonable [and] if they are known to the student or should have been."

VIII. RESOURCES:

1. Kaplin, The Law of Higher Education, 2d ed. (1985) [Published by Jossey-Bass Publishers, 433 California St., San Francisco 94104]

2. Kaplin and Lee, The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making: 1988 Update [supplements Kaplin's The Law of Higher Education and is available from Jossey-Bass, Inc., Publishers or for Professor Kaplin, School of Law Catholic University, Washington, D.C. 20064, Ph. 202/635-5140] ($4.00)

3. Bickel, The College Administrator and the Courts, rev. ed. 1988 [Published by College Administration Publications, Inc., P.O. Box 8492, Asheville, N.C. 28804 (ph: 704/252-0883)]: Briefs of significant higher court decisions plus editorial comment. Casebook, 650 pages 8 1/2 x 11 in binder, all updating back issues since casebook and four quarterly updating supplements: $99.50. Yearly renewal rate: $42.50.

4. Young and Gehring, The College Student and the Courts, [Published by College Administration Publications, Inc., P.O. Box 8492, Asheville, N.C. 28804 (ph: 704/252-0883)]: Briefs of significant higher court decisions plus introductory & editorial comment. Casebook, 568 pages 8 1/2 x 11 in binder, all back issues and four quarterly supplements: $98.50. Yearly renewal rate: $42.50.

5. Pavela, Dismissal of Students with Mental Disorders: Legal Issues, Policy Considerations and Alternative Responses. Paperback, 108 pages, 6 x 9: $9.95 [Available from College Administration Publications, Inc., P.O. Box 8492, Asheville, N.C. 28804 (ph: 704/252-0883)].

6. Pavela, "Limiting the 'Pursuit of Perfect Justice' on Campus: A Proposed Code of Student Conduct," 6 J.C.& U.L. 137 (1979)

7. Sutherland, "Bad Acts Off Campus: The Limits of Institutional Authority - Issues Relating to Students" [Outline from presentation given at 1988 annual NACUA conference]

8. Stoner, "Student Conduct and Behavior: Legal, Practical and Institutional Advantages of Commencing College Disciplinary Proceedings Where Criminal Charges Are Pending Against A Student for Alleged Serious Misconduct." [NACUA outline XXVI-85-30]

9. Young, "The Law and the Student in Higher Education," N.O.L.P.E. (1976).

10. Holmes, "Law and Discipline on Campus," The Institute of Continuing Legal Education, Ann Arbor, Michigan.

11. O'Hara & Hill, "The Student/The College/The Law" Teachers College Press (Columbia University).

DIFFICULT AND TROUBLED STUDENTS
"Student Issues" -- March 3, 1989

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I am pleased to acknowledge the collaboration of William Steimer of the University of North Carolina at Charlotte in developing 1984 NACUA Conference materials on "'Psychiatric' Withdrawals and Readmissions", from which this outline derives in substantial part.

I. Premises

A. "Difficult" or "troublesome" student conduct does not present novel legal questions, but rather the fairly straightforward question of demonstrating a manifest relationship between that conduct and participation in an institutional function.

1. This is "black-letter" law as presented almost 20 years ago in **Griggs v. Duke Power Co.**. Its application has developed steadily in this area from "physical" situations (**Davis v. Southeastern Community College**) through "mental" or "emotional" ones (**Doe v. NYU**) to current issues that may affect large segments of a student population, such as drug use or AIDS exposure.

2. **It is conduct or behavior which is at issue, not the student's personal status or condition and not the behavior's cause.** The issue is not that a student is "disabled" or "disturbed", or (without more) has tested positively for drugs or AIDS. (The institutional response to violation of its behavioral norms may -- or may not -- eventually change the student's standing in the institution, but that is a different issue.)

3. **Conduct becomes relevant when it's sufficiently unusual to become problematic for someone in the institutional community.** The standards controlling that behavior must be those adopted by the institution, not the personal views of members of its community.

    a. The behavioral standard, breaches thereof, possible responses, and relevant procedures should be defined in codes, handbooks, etc. Prohibited conduct should be defined as clearly as possible within the bounds of overly detailed regulation at one extreme and insufficient notice at the other.

b. Risks of "the catalogue as contract" are outweighed by the risk of not having sufficiently anticipated different varieties of institutional involvement; see Jennings, "Breach of Contract Suits by Students Against Postsecondary Educational Institutions: Can They Succeed?", 7 JCUL 191 (1981), and Davenport, "The Catalogue in the Courtroom: From Shield to Sword?", 12 JCUL 201 (1985).

B. These are matter of art, not science.

1. The substance and nature of a particular rule, and of the procedure through which it is implemented, are more important than its label. The skill and technique of the people who accomplish an action ultimately are more important than form.

2. Appropriate "sorting" is essential before questions of institutional action arise. In practice most higher education communities have no alternative but to be tolerant of odd behavior and to be skeptical of the view that every complaint of bizarre or idiosyncratic conduct warrants institutional response. This principle applies in direct proportion to the size and diversity of the student body, and perhaps as well to the public character of the institution.

3. Specifically, "psychiatric" reasons may be relevant to understanding problematical conduct or to defining the institutional response, but it is still the conduct which requires action, not its "psychology". Institutional responses are not properly labeled "psychiatric" but "normative", in the sense that they vindicate institutional norms of conduct.

C. Institutions must make clear who is expected to take what action, given what information.

1. The administrative goal is that each institutional officer performs a proper role so that the overall institutional response is comprehensive and consistent rather than fragmentary, conflicting and erratic.

2. Planning for the institutional responsive obviously is vital. But communicating that planning, and communicating about particular instances of odd conduct, are essential to assuring smooth and accurate response.

D. Effective procedures can be arranged regardless of whether they are labeled contractual (Roth and Sinderman), academic (Horowitz), or disciplinary (Goss).

1. The requirements for fair procedures are straightforward and enjoy the deference accorded by the judiciary to academic decisions. See generally as to higher education **University of Michigan v. Ewing**, 474 U.S. 214 106 S. Ct. 507 (1985); cf. Milam and Marshall, "Impact of **Regents of the University of Michigan v. Ewing** on Academic Dismissals from Graduate and Professional Schools", 13 JCUL 335 (1987).

2. Both withdrawals and readmissions can be readily accomplished, and without undue procedural detail, if the institution is sufficiently clear, patient, and careful and pays sufficient attention to detail. See **Martin v. Helstad**, 578 F. Supp. 1473 (W.D. Wis. 1983).

3. The key is for the institution in fact to implement fully whatever procedures it has chosen to define or invoke, or is bound by. Compare **Patton v. St. Bd. of Higher Ed.**, 651 P.2d 169 (Ore. App. 1982): institutional hearing as to order for mandatory medical leave from public institution insufficient when it did not include citation of particular statutes/rules involved or particular conduct at issue. Cf. **Aronson v. North Park College** and **Corso V. Creighton University**, both infra.

4. Institutions need not shirk from dealing with specific situations that justify clear rules. But solutions should be clearly tailored and narrow, and not rest on predicates that if followed logically would require actions the institution is not prepared to take -- a concern particularly in determining when/whether to require drug or AIDS testing.

II. Conduct and Rules

A. "Troubling" or "difficult" conduct presents the institution with what ultimately will be determined to be one and only one of two and only two situations: it does or does not violate evident institutional norms.

B. The conduct does not violate institutional norms (it is not "illegal") although it may be disturbing to a particular member of the campus community.

1. Appropriate administrative responses may include: doing nothing; explaining to the complainant why conduct reported does not violate institutional norms; working with the student on a voluntary basis to modify the "troubling" conduct; protecting the student in question from improper interference by self-appointed "guardians of the university interest."

2. The incident may prompt re-examination by the institution of whether the conduct ought to be "illegal" -- as when the situation had never before been considered, or when the institution thought extant rules in fact did cover situations. But such prospective general action is different from responding to immediate incidents.

C. The conduct does violate institutional norms (e.g., it constitutes a disciplinary violation or results in an academic deficiency) and warrants a pre-defined institutional response (e.g., disciplinary or academic suspension).

1. Institutional standards of conduct already are comprehensive and specific in many respects, ranging from criminal and tort rules (e.g., firearms violations, assault, theft, misuse of institutional property) to institutional academic (cheating) or student conduct (dorm rules) norms.

2. The "psychiatric" or "non-psychiatric" origin of the conduct is completely irrelevant to whether a violation of rules has occurred: the matter can be resolved completely without knowing if there's a "psychiatric" basis for it. See Corso v. Creighton University, 731 F.2d 529 (8th Cir. 1984): the individual cheating alleged might appear to a reader of the opinion to suggest a "pathology," but the issue was not discussed in the case and was clearly unnecessary to its disposition.

D. There are no situations outside this structure: conduct either is, or is not, arguably prohibited by some institutional rule. In cases of troubling conduct the key is using well-drawn general rules of the "conduct unbecoming" variety: e.g., conduct or condition which sufficiently interferes with or threatens the institution's peace and order.

1. These situations are difficult but not impossible: they must be handled with care and clarity.

2. If the rule provides an adequate basis of notice for appropriately banned conduct, and if the procedure is applied effectively to appropriate facts, public institutions ought not to have a harder time using such general standards than do private ones. See Aronson v. North Park College, 411 N.E.2d 776 (111. App. 1981): private college catalogue language provides adequate contractual basis for dismissal based on psychologist's memorandum regarding student's conduct and characteristics.

3. The real problem is that very difficult human judgments ultimately are at stake. Too severe a view of the situation may "unfairly" penalize the student; reluctance to make such a judgment (or follow well-grounded intuition) may yield a disaster. To this dilemma there can be no satisfactory universal answer: the difficulty posed by any specific situation cannot be resolved by resort to any maginal process, nor can the sufficiency of an "overt act" can be identified by any a priori formulation.

E. What of the "troubling" behavior as to which there's a question of coverage even by general institutional rules?

1. The first step is to assure that in fact there has been conduct -- some particular action. If so, the matter is cognizable without regard to its "troubled" origin. If not, there's nothing actionable to work with, regardless of its origin.

2. It may be that the best process is not an institutional one, but rather resort to outside procedures such as commitment.

3. The most difficult case obviously is where even under a well-drawn institutional code it's not clear that a particular matter is concrete enough to be cognizable, even though the collective institutional judgment is that a serious problem exists. In these cases, the preservation of life and safety are paramount concerns; compare Furrh v. Arizona Board of Regents, 676 P.2d 1141 (Ariz. App. 1983).

F. One suggested alternative to application of regular disciplinary or academic rules and procedures, especially in the "grey" case, is a procedure which focuses on the "troubled" nature of the conduct, often labeled a "psychiatric" or "involuntary" procedure.

1. "Psychiatric" action may be suggested most often in situations where identifying the potentially illegal conduct is difficult, even under the institution's general conduct clause -- particularly when an obviously "troubled" student has a good deal of cumulatively "odd" behavior but has not yet done anything specifically "wrong" (and where the evidence thereof is "psychiatric").

2. Yet even in this circumstance, without sufficient conduct or behavior it will be difficult to enforce a student's disassociation from the campus. The "psychiatric" origin of the conduct may be evidence of the fact that action should be taken, but it will not constitute the sole basis for such action.

3. Ordinary institutional sanctions are involuntary, and if the student's emotional or mental state is relevant they provide an opportunity for evidence in that regard. Ultimately, neither the procedural attributes, burdens of proof or persuasion, nor practical delicacy of the matter are lessened by such a label for the process.

III. Structural issues.

A. The organizational problem is not one of rules or procedures, but of putting together a variety of institutional actors who have overlapping functions depending on when they come in contact with the student. See Recommended Standards and Practices for a College Health Program, American College Health Association (1984), reprinted in 32 Jnl. of Amer. Coll. Hlth. #4, especially section on "Ethical and Professional Relationships."

1. Administrators, faculty, student life personnel, security officers, counselors and therapists, attorneys, other students -- each at one time or another may be both friend and victim, confidante and accuser, adviser and judge.

2. Roles must be very clear, and there must be a single identified person who sorts out each situation.

3. Clarity of roles is imperative of there's any hope of a voluntary resolution of the matter, and the best solution is almost always the student's voluntary agreement to a course of action the institution believes will ameliorate the troubling behavior -- withdrawal, professional counseling, simply making the student aware that the behavior is a matter of concern and requesting the student's caution.

B. In particular, counselors and therapists may be in very difficult positions when forced into the multiple roles of therapist, administrative "early warning" network, and evaluator of putative disciplinary cases.

1. Thus define clearly who is involved, and in what way, at any stages where "professional" intervention is claimed to be needed.

2. Voluntary confidential therapeutic counseling should be clearly distinguished from administrative referrals which are part of a mandatory process and may not be confidential. If at all possible, separate professionals should be used for the two different types of actions. At the very least, counselors and therapists should not be involved in disciplinary matters at stages when they are not truly needed, to minimize role conflicts of this sort.

3. In any event, these are not "psychological" or "psychiatric" decisions. Broader judgments are needed, for which these are simply one source of analysis -- and a source whose predictive limits should be acknowledged.

IV. Practice pointers

A. A single set of standards of conduct should govern initial or transfer admission, matriculation, withdrawal and dismissal, and readmission, varying as appropriate to the stage in question but having a common sense of the depth of inquiry which the institution wants to make before applying its judgment favorably.

B. The crux of any decision involving behavior is prognosis: Is the student sufficiently likely to have a recurrence of problematical or prohibited conduct, or to engage in new such conduct? Before this decision comes the prior determination of what level or depth of inquiry will support it, especially in admissions decisions.

C. Not only may the institution rely in at any such stage on relevant past conduct or future conditions, there are instances when it has heightened liability exposure if it fails to do so -- especially when there may be a duty to ascertain past conduct at the same institution (readmission) or elsewhere (transfer)

1. See, e.g., the "Tarasoff" possibilities explored in Woods and Steadman, "Bradley Center, Inc. v. Wessner: The Psychotherapist's Duty to Protect," 10 JCUL 293 (1983-84), and the safety issues in Kobasic, Smith and Zuckjer, "Case Comment: **Eiseman v. State of New York:** The Duty of a College to Protect its Students from Harm by Other Students Admitted Under Special Programs", 14 JCUL 591 (1988).

2. Falsifying answers to institutional pre-admission inquiries is an independent ground for dismissal; see **Martin v. Helstad, supra** (false information as to criminal conviction).

3. At the other end of the student's career is the question to what to say on a transcript or recommendation.

D. Still it can be difficult to predict behavior accurately and to decide what information to rely on.

1. Even aside from the non-"psychological" nature of these matters as such, institutions should avoid the "battle of the counselors." The institution's decision must have a factual basis, but it need not and should not be changed simply because the student can provide a therapist with a different and more favorable opinion than that of the institution.

2. The nature of the program which the student seeks to (re-)enter is highly relevant, especially as to academic or other stresses (e.g., patient care, dorm living, competitive program).

3. Prior withdrawal processes should be seen as a basis for successful readmission decisions. The plea, verdict or other result should set a clear stage for the readmission decision so far as it can be anticipated. Contingencies which must be met to be eligible for readmission (fulfillment to be necessary, but not sufficient prerequisite) should be stated explicitly (e.g., therapy, therapy + prognosis, demonstration of responsible conduct in other areas, academic re-qualification).

V. Section 504

A. Section 504 rules and cases not only protect institutional discretion but provide a useful analytical framework. See generally Rothstein, "Section 504 of the Rehabilitation Act: Emerging Issues for Colleges and Universities", 13 JCUL 229 (1986).

1. These sources stress that students must meet behavioral standards in light of the nature of a program or activity , competing applicants for admission or participation, and relationship of past action and its severity to likely future problems.

2. That is the clear teaching of **Southeastern Commty. College v. Davis**, 442 U.S. 397 (1979). Section 504 holdings defer to institutional decisions when agency has made good-faith attempt to review matter and its decision has basis in fact.

3. Importantly, the result is the same as to student discipline specifically. See **S-2 v. Turlington**, 635 F.2d 342 (5th Cir.1981), **cert. denied** ____ U.S. ____ (1981): Section 504 does not preclude dismissal for behavioral problems when procedures are appropriate.

B. Especially useful is the "Analysis" accompanying the initial H.E.W. 504 regulation, which was not reprinted in the CFR codification), which makes clear that in applying 504's protection only of "qualified" handicapped persons, an element of being qualified is living up to institutional norms. The text addresses alcoholism and drug addiction specifically, but it's fully generalizable as to any condition:

> It cannot be emphasized too strongly that the statute and regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism...to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken

into account. Thus a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students. [42 F.R. 22676 at 22686 (May 4, 1977)].

C. Case law demonstrates that rigor and specificity of inquiry into "troubled" student's behavior and conduct are the keys to successful institutional action.

1. Successful institutional results:

a. **Doe v. N.Y.U.**, 666 F. 2d 761 (2nd Cir. 1981): suicidal, violent and unpredictable former medical student who had lied about history and treatment and had attacked therapist was properly denied readmission on basis of her uncertain ability to succeed [in comparison to other applicants lacking such disqualifying attributes].

b. **Doe v. Region 13 Mental Health-Mental Retardation Commn.**, 704 F.2d 1302 (5th Cir. 1983): depressed and suicidal counselor was properly discharged after close observation of deteriorated condition, even when initial condition would not have warranted failure to hire.

2. Unsuccessful institutional results:

a. **Pushkin v. Regents of University of Colorado**, 658 F. 2d 1372 (10th Cir. 1981): M.D. with multiple sclerosis was improperly excluded from psychiatric residency when decision "not predicated on any known deficiency of Dr. Pushkin himself, but rather these are reasons based upon the examiners' general knowledge of multiple sclerosis and their concern for psychologic reactions of the patient and in turn the doctor, as a result of his being in a wheelchair."

b. **Goldsmith v. N.Y. Psychoanalytic Inst.**, 22 CCH/EPD Par. 30764 (N.Y. App. Div. 1980): M.D. with Hodgkin's disease in remission was improperly excluded from psychoanalytic program when faculty ignored all objective information, as well as recommendations of two faculty committees, and acted on their personal fears about plaintiff's ability to undergo analysis.

VI. AIDS

A. There is scant higher education case law. The issue most clearly relevant to this workshop, the counselor or therapist's duty to inform third parties on a "Tarasoff" theory, will be discussed in the "liability" session.

1. But AIDS and related conditions and results clearly can trigger the application of Section 504; see **Schl. Bd. of Nassau Cnty. v. Arline**, 107 S. Ct. 1123 (1987) (contagious diseases generally; tuberculosis specifically); **Chalk v. U.S.D.C./C.D. Cal.**, 840 F.2d 701 (9th Cir. 1988) (preliminary injunction on behalf of teacher diagnosed as having AIDS).

2. See **Doe v. Washington Univ.**, Cir. Ct. of St. Louis, Mo. #882-6952 and U.S.D.C./E.D.Mo./Eastern Div. #88-2509-C-4: preliminary injunction sought to bar student "diagnosed as being positive for exposure to HIV" from continuing in dental school.

3. See generally 1988 **NACUA Conference Outlines** by Melinda A. Agsten and Frederick G. Savage.

B. The predicate for any consideration of AIDS-related conduct should be a clear understanding of the larger issues by the campus community. See, e.g.: **Information About AIDS for the Columbia Community**, Columbia University Health Service (October 1986), and **Information About AIDS for the Cornell Community**, Cornell University AIDS Advisory Committee (fall 1988); **AIDS on the College Campus**, American College Health Association Special Report (1986), and **General Statement on Institution Response to AIDS**, ACHA Task Force on Aids (revised November 1988); Brickley, "AIDS: A University's Liability for Failure to Protect Its Students", 14 JCUL 529 (1988).

BAD ACTS OFF CAMPUS: THE LIMITS OF INSTITUTIONAL AUTHORITY

Issues Relating To Students

June 26-29, 1988

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I. INTRODUCTION

A. Any College or University, particularly a large one, will inevitably have a major impact upon the community with in which it resides. It is important for the institution to maintain a positive relationship with its community for many reasons. Students, their behavior, and the effects of their presence constitute perhaps the most conspicuous, if not the greatest, impact a College or University has upon the community. It may well be in the best interest of the institution to try to regulate in some ways the off campus conduct and activities of students for the primary purpose of fostering good town-gown relations and protecting the institution from the negative effects of a hostile local environment. Given established principles, is this legally permissible?

B. It is generally accepted that the ability of a public institution to control the off campus conduct or activities of its students is limited. The most frequently expressed view is that such controls must relate directly to the educational mission of the institution or the health, safety and welfare of other members of the campus community. Most cases permitting the exercise of institutional authority are in the area of drugs and alcohol, or dangerous criminal activity which forms a legitimate basis for concern for safety on campus.

C. It is a rather novel proposition that off campus behavior or activities which pose no direct physical threat to the institution or its campus community might be controlled to maintain the good citizenship of the institution, and/or to protect it from the very real hazards of official municipal ill-will.

II. PURPOSE

A. The purpose of this presentation is to explore the limits of an educational institution's ability to assert jurisdiction over student conduct and activity off campus.

III. SCOPE OF TOPIC

A. This presentation will consider off campus conduct and activities of students in three general areas:

1. Criminal
2. Non-Criminal but Offensive
3. Innocent Activities Having An Allegedly Adverse Impact On The Local Community

IV. BACKGROUND

A. In Loco Parentis

1. Early view that Colleges and Universities had broad authority to regulate student activity. "College authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the betterment of their pupils that a parent could for the same purpose." Gott v. Berea College, 161 S.W. 204 (Ky. 1913). Attendance is a privilege and even discriminatory or arbitrary conditions can be attached by the state. Hamilton v. Regents of University of California, 293 U.S. 245 (1934). See KAPLAN, THE LAW OF HIGHER EDUCATION, SECOND EDITION, Sec. 1.2.

2. Later increased recognition of Federal Constitutional protections for students. Students rights recognized as limitations to institutional authority. First Amendment protections for speech, press and religion; Fourth Amendment protection against unreasonable searches and seizures; Fourteenth Amendment protections of due

process and equal protection. Tinker v. Des Moines, 393 U.S. 503 (1969); Papish v. Bd., 410 U.S. 667 (1973) (filthy speech movement); Dixon v. Alabama State Board of Education, 294 F2 150 (5th Cir. 1961); Healy v. James, 408 U.S. 169 (1972).

3. Modern view is expressed in firms of institutional liability for injury to students off campus. See Baldwin v. Zorahi, 176 Cal. Rept. 809 (1981). See also Bradshaw v. Raulings 612 F2 135 (3d Cir. 1979).

B. Bases for In Loco Parentis

1. To ensure physical and mental welfare of students. Gott v. Berea (1913, Supra);

2. Because "In the school, as in the family, there exists on the part of the pupils the obligation of obedience to lawful commands, subordination and civil deportment, respect for the rights of others and fidelity to duty". Tanton v. McKenney, 197 N.W. 510 (Mich. 1924);

3. Because attendance is a privilege and not a right. Hamilton, supra.

4. To insure maintenance of order and decorum within the educational system. Commonwealth of Pennsylvania v. Michael J. Downing, 470 A2 526 (1983).

C. Current Status of In Loco Parentis

The traditional doctrine of in loco parentis probably has little legal validity today in a public institution, although there are certain componants which may survive depending upon how the term is defined.

V. SPECIFIED TYPES OF OFF CAMPUS STUDENT CONDUCT/ACTIVITY

A. Criminal

1. Violation of any criminal or civil laws- University rule upheld which stated that disciplinary action would be taken against students for misconduct while on or off campus, including students who might be convicted by

University officials or by city, county or federal police for violation of any criminal or civil laws. Due v. Florida Agricultural and Mechanical University, (1963 N.D. Fla) 233 F. Supp 396.

2. Off Campus reckless driving -
University suspension of student upheld where off campus reckless driving, despite previous warnings, violated handbook provision that students are accepted in the University only as responsible law-abiding adults, and are subject to suspension from the University for any violation of the laws or for irresponsible, immature behavior, either on or off the campus. Cornette v. Aldridge, 408 S.W.2 935 (1966).

3. Posession or sale of drugs -
The Court ruled that the suspension of students who had been placed on probation for or finally convicted of, the illegal use, possession or sale of a drug or narcotic, regardless of whether or not the illegal act giving rise to the conviction occurred on or off campus did not violate students rights where a hearing was available to the student. Theory that student drug offenders pose a threat to other students in the University. Paine v. Board of Regents, 474 F2 1397 (5th Cir. 1972), 355 F.Supp. 199 (W.D. Tex. 1972).

4. Any Criminal Conduct-
University has the prerogative to determine that any unlawful possession of drugs or criminal conduct on the part of students was detrimental to it whether or not on University property. Krasnow v. Virginia Polytechnic Institute, 551 F2 591 (4th Cir. 1977).

5. Behavior detrimental to interests of University Community- Catalog provision stating that a student may be required to withdraw from the University when the students actions are judged by competent authorities, using established procedures, to be detrimental to the interests of the University community, found not to be vague where student in a school of pharmacy was suspended indefinitely from school upon finding of guilt in off campus drug related behavior. Sohmer v. Kinnard, 535 F. Supp. 50 (D.Md. 1982).

B. Non Criminal But Offensive

1. Restaurant Sit-in & Street demonstration- In the leading case of Dixon v. Alabama, a case concerning the due process rights of students in expulsion proceedings, the conduct giving rise to the expulsion was off campus at a local restaurant and on city streets. The Fifth Circuit insisted the students must have fair hearings, but never suggested that this off campus activity might not be a proper basis for University discipline. Dixon v. Alabama State Board of Education, 294 F.2 105 (5th Cir. 1961).

2. Street demonstrations & student character & local laws- Students suspended from college for behavior occurring while participating in demonstrations on public streets adjacent to campus. College regulation addresses broadly issues of character: "....all students are expected to conform to ordinary and acceptable social customs and to conduct themselves at all times and in all places in a manner befitting a student of Central Mo. State College...All students assume an obligation to abide by the rules and regulations of the college as well as local and federal laws". Student presumed to know that "...destruction of property, threats to others, frightening passers by and intrusions upon rights of travel are unacceptable if not illegal, and are not worthy of one who would pursue knowledge at the College level. Esteban v. Central Mo. State College, 415 F2 1077 (8th Cir. 1969).

3. Interference with College missions, processes or functions- Student disciplinary standards may apply to student behavior on and off campus when relevant to any lawful mission, process or function of the institution, and by such standards of student conduct the institution may prohibit any action or omission which impairs, interferes with or obstructs the mission, processes and functions of the institution and may require superior ethical and moral behavior, the institution not being limited to the standards or the forms of criminal laws. Krasnow v. Virginia Polytechnic Institute, 551 F2 591 (4th Cir., 1977).

4. Party Crashing-College regulations against assault, harassment, personal abuse and trespass were violated when students uninvitedly entered an

off-campus party at a private off campus residence and were disorderly and disruptive. The Court rejected the students contention that the College lacked jurisdiction over off campus conduct stating that a College obviously has a vital interest in the character of its students and may regard off campus behavior as a reflection of a students fitness to be a member of the student body. Kusnir v. Leach, 439 A2 223 (1982).

5. Negative Public Attention In upholding the changing of a graduate teaching assistant's position following off campus incidents arising from her homosexual relationship with a student not involved in any of her classes, Court relies heavily on University legitimate interest in protecting its own good name in the face of public attention, parental complaints and public incidents requiring police intervention. Naragon v. Wharton, 572 F. Supp. 1117 (M.D.Lo. 1983).

C. Innocent Activities Impacting The Community

1. Housing-Prostrollo v. University of S.D., 507 F2 775 (8th Cir. 1974). Case involving challenge of University regulations requiring all single freshmen and sophomores to live in University residence halls. Regulations challenged on the basis of alleged violation of constitutional rights to privacy and equal protection. Rule and its classification must be directed towards a permissible objective.

   a. Rule does not violate any fundamental right.

      * no fundamental right to choose one place of residence and with whom to live;

      * compelling state interest test does not apply.

   b. Equal protection with respect to the classification:

      * Primacy rule rejected;

      * Any rational basis may justify classifications.

2. Housing-Cooper v. Nix, 495 F2 1285 (5th Cir. 1974). In a case involving University requirement that students live on campus, only fault found in arbitrary exemption of students 23 and older. Reference made to educational retionale, however.

3. Vehicles-Miami University v. Shriver 735 F2 201 (6th Cir. 1984). Test of constitutionality of a "no car" policy for undergraduate students. District Court upheld the constitutionality of the ban. The 6th Circuit Court did not decide the constitutional issue.

4. Display of Art-University held able to order removal from a public display artwork of a Art Professor on grounds and it was objectionable and embarrassing to the University. Such art was not entitled to same degree of First Amendment protection as students' speakers', and instructors' rights. Must yield to rights of those who must pass in public corridors. Close v. Lederle, 424 F2 988 (1st Cir. 1970).

PRIVATE LIVES IN PUBLIC PLACES: CONTROL AND REGULATION OF STUDENT BEHAVIOR

June 28-July 1, 1989

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I. A NEW IN LOCO PARENTIS?

A. The earliest and most often cited discussion of in loco parentis is found in Gott v. Berea College, 161 S.W. 204 (1913).

1. Under this doctrine, colleges and universities had a duty to protect the safety, morals and welfare of their students as parents were expected to protect their children.

2. Colleges and universities found they were liable for injuries sustained by students. (See, e.g., Barr v.Brooklyn Children's Aid Society, 190 N.Y.S. 296 (1921) Brigham Young Univ. v. Lillywhite, 118 F.2d 836 (10th Cir. 1941), cert. denied, 314 U.S. 638).)

B. In the 1960's and early 1970's dramatic changes occurred in the legal status of students. (See, e.g. Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961); Tinker v. Des Moines School District, 393 U.S. 503 (1969); Healy v. James, 408 U.S. 169 (1972); Goss v. Lopez, 419 U.S. 565 (1975)).

1. A new arms-length relationship between the college and student began to develop and replace the old parental relationship.

2. Since the 1971 ratification of the Twenty-Sixth Amendment which lowered the federal voting age to eighteen, most states maintain the age of majority at eighteen or nineteen for many other purposes, including the right to enter into enforceable contracts.

3. Courts began rejecting negligence claims against colleges. Previously, these claims would have been successful. (See e.g. Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979); Campbell v. Board of Trustees, 495 N.E.2d 227)).

C. Today, students increasingly have brought negligence suits seeking damages from colleges and universities. In general, these claims for recovery are extensions of traditional tort theories.

II. INSTITUTIONAL LIABILITY--GENERAL THEORIES OF TORT LAW.

A. To establish the institution's negligence, the plaintiff must prove that the institution owed a duty of care to the student, that a breach of this duty caused the student to suffer harm, and that the institution's conduct was the proximate cause of this harm. (See Miyamoto, Liability of Colleges and Universities for Injuries During Extracurricular Activities, 15 J. of College and University Law 149, 150 (1988)).

1. Most often plaintiffs have argued that post secondary institutions owe their students a duty of care. Liability is warranted because institutions have a duty:

a. to protect students pursuant to the in loco parentis doctrine;

b. to supervise students;

c. to control the acts of third persons;

d. to protect students pursuant to their status as invitees.

2. Regardless of which theory of duty is being addressed, the extent to which the institution knew, or should have known, that the student was exposed to a risk of injury often plays a major role in the court's decision as to whether the institution owed a duty of care. (Id. at 150).

B. Generally, court decisions reflect a reluctance to impose liability on post secondary institutions.

1. Underlying this reluctance are broad policy considerations:

a. The modern American college is not an insurer of the safety of its students;

b. Students are adults who are able to take care of themselves;

c. It is unreasonable, impractical and inconsistent with students' rights to require that colleges regulate personal student conduct. (See Bradshaw v. Rawlings, 612 F.2d 135, 138-40 (3d Cir. 1979), cert. denied, 446 U.S. 909 (1980); Whitlock v. University of Denver, 744 P.2d 54 (Colo. 1987); Campbell v. Board of Trustees, 495 N.E.2d 227 (Ind. App. 1986);Beach v. University of Utah, 726 P.2d 413, 419 (Utah 1986)).

2. There is ordinarily no "special relationship" between post secondary institutions and students that obligates the institutions to supervise and control student's conduct. (See Restatement of Torts 2d secs. 315, et seq.; Whitlock v. University of Denver, 744 P.2d 54 (Colo. 1987); Campbell v. Board of Trustees, 495 N.E.2d 227 (1986)).

III. APPLICATION OF TORT LAW.

A. Alcohol related incidents.

1. Courts are reluctant to find a university liable for injuries suffered by students or third parties who are injured at a college related function, short of overt actions on behalf of the university.

2. This reluctance has usually been exhibited by an unwillingness to find that any "special" or custodial relationship exists simply as a result of the college-student relationship. Based on constitutional amendment, written and unwritten law, and the evolution of new customs, college students are now considered adults responsible for their own actions. (See Bradshaw v. Rawlings, 464 F. Supp. 175 (E.D. Pa. 1979); 612 F.2d 135 (3d Cir. 1979), cert. denied, 446 U.S. 909 (1980), and Baldwin v. Zoradi, 123 Call. App.3d 275; 176 Cal. Rptr. 809 (1981)).

a. In both Bradshaw and Zoradi cases this lack of a "special" relationship was determined in spite of the fact that both institutions had policies prohibiting consumption of alcoholic beverages which plaintiffs claimed were violated.

b. In addition, in Zoradi the court noted that the college's prohibition regulations did not create a "mandatory duty of enforcement" and that the "alleged lack of supervision of the dormitory did not state a cause of action for negligent creation of a dangerous condition". (Id. at 286-87, id at 816).

c. In Campbell v. Board of Trustees of Wabash College, supra., the court refused to impose a legal duty upon the college when neither party expected it to perform. That is, to control the drinking of a student on college owned property. (Plaintiff and defendant's student had been drinking in defendant's student's fraternity house room. Defendant's student, while intoxicated, was involved in an automobile accident causing injuries to plaintiff).

d. Noting that the doctrine of comparative negligence, as opposed to contributory negligence, was applicable a California court held the University of California twenty percent liable for injuries to a non-student plaintiff who, while intoxicated, fell down a flight of stairs. It was shown that the plaintiff continued to be served at a function supervised by resident hall staff while he was "obviously intoxicated". (See Zavala v. Regents of University of California, 125 Cal. App. 3d 648, 178 Cal. Rptr. 185 (1981).

3. Policies--courts could conceivably determine that a university had undertaken the duty of a custodial relationship if strict and bold alcohol policies are implemented. (See McLean, supra. at 403-404).

a. Colleges must be mindful of the legal distinction between "nonfeasance" and "misfeasance" least they create a liability for torts where such liability would not have been recognized but for the policy. (Id.).

(1) "Nonfeasance", is the passive inaction or failure to take steps to prevent others from harm. Under a long standing theory, courts have normally refused to extend liability for nonfeasance. (See Professor on Torts, Chap. 10, sec. 54 (3rd ed. 1964).

(2) "Misfeasance", is the active misconduct working positive injury to others. (Id).

b. A university wishing to take positive action to educate the student population would be well advised to adopt policies that fostered alcohol awareness and responsible drinking as opposed to implementing policies that attempted to identify and treat problem drinkers.

C. VIOLENT CRIME ON CAMPUS.

1. In the area of violent crimes courts have been more willing to find a special relationship based in the theory of landlord-tenant as well as the legal principles applicable to landwoners generally. (See Durate v. State of California, 151 Cal. Rptr. 727 (1979) (Finding that the university not only had control over the campus area and the residential facilities but also many aspects of personal activities, the court concluded that the plaintiff had in many substantial respects surrendered the control of her person, control of her own security to the university); Relyea v. state of Florida, 385 So. 2d 1378 (Fla. 1980)).

2. In most of the reported cases, these negligence actions rely upon a duty of the post secondary institution to provide reasonable security, a breach of that duty, reliance by the victim on an express or implied promise of security, and that the breach of defendant's duty was the proximate cause of the victim's injury.

3. While the cases regarding violent crime on campus illustrate a variety of legal theories for analyzing them, in general when an institution has foreseen or ought to have foreseen that criminal activity will likely occur on campus it must take reasonable, appropriate steps to safeguard its students and other persons whom it has expressly or implicitly invited onto its premises. (See Kaplan, supra.).

   a. Under the landlord-tenant theory, insofar as a university knows that there is a high incidence of crime on campus, it is obligated as a landlord to take reasonable protective measures to prevent outside assailants from intentionally causing harm to students residing in its residence halls. (See Kaplan, The Law of Higher Education, 2d, 4.14.2 (1985); Relyea, supra.).

   b. A duty to protect can also be implied from the lease agreement between the university and student. (See Durate v. State of California, 151 Cal. Rptr. 727).

   c. Under a theory of negligent misrepresentation it has been suggested that colleges could be liable if it is falsely represented by the college that the campus is reasonably safe and students have no reasonable grounds for believing the representation not to be true. (See Durate v. State of California, id; Mullins v. Pine Manor College, 449 N.E.2d 331 (1983)).

d. In Pine Manor, id, the court held that when an institution takes on a responsibility to provide security, it is subject to possible liability if injuries should occur as a result of its having failed to exercise reasonable care in carrying out that commitment. A plaintiff will prevail only if it can be shown that the failure to exercise due care increased the risk, or the harm was suffered because of the students reliance on the undertaking.

D. REGULATION OF OFF-CAMPUS CONDUCT.

1. The law holds that there is no general legal duty on the part of the university to control off-campus conduct of students.

2. Where a university chooses to control off-campus behavior modern law requires restrictions and sanctions relative to off-campus conduct must be reasonable and directly related to the educational mission of the university or the welfare of the campus community.

3. Conduct which does not rise (or decline) to the level governed by criminal standards may theoretically also be addressed; however, students are entitled to reasonable notice of the conduct which is proscribed, and non-criminal behavior may be difficult to categorize with the legally requisite degree of specificity. (See, e.g., Sword v. Fox, 446 F.2d 1091 (4th Cir. 1971); Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969). Where First Amendment concerns are also at issue, various principles will apply, such as the constitutional doctrine that the regulation be narrowly tailored to serve the governmental interest (See Grayned v. Rockford, 408 U.S. 104, 115 (1972); Healy v. James, 408 U.S. 169 (1972)).

4. Cases where university authority to punish off-campus behavior were upheld:

a. Doe v. Florida A&M University, 233 F.Supp. 396 (N.D. Fla. 1963). University had authority to suspend students for contempt convictions, under provisions of student handbook that disciplinary action would be taken against students for misconduct on or off campus, including conviction by university officials or city, county, or federal police for violation of criminal or civil law, where the institution provided adequate notice and a hearing to such students prior to their suspensions.

b. Krasnow v. Virginia Polytechnic Institute, 551 F.2d 591 (4th Cir. 1977). University had right to determine that any off-campus unlawful possession of drugs and any criminal conduct on or off campus were detrimental to it; thus, where students who violated the rules received a hearing at which appropriate sanctions were determined, the rules did not violate their rights to due process.

c. Sohmer v. Kinnard, 535 F.Supp. 50 (D.Md. 1982). On the basis of a rule allowing the university to compel a student's withdrawal when the student's actions were adjudged detrimental to the interest of the university community, a School of Pharmacy was entitled to dismiss a student on charges that he had worked at a pharmacy while impaired as a result of improper use of two prescription drugs, and that he had illegally possessed cocaine. The student had received a university hearing on the charges.

d. Kusnir v. Leach, 439 A.2d 223 (Pa. Commw. Ct. 1982). College was entitled to suspend a student subsequent to a hearing on charges of participating in an incident of off-campus misconduct (trespass and other associated disruptive behavior). College regulations prohibited behavior such as assault, harassment, personal abuse and trespass.

e. Wallace v. Florida A & M University, 433 So. 2d 600 (Fla. Dist. Ct. App. 1983). University was authorized, following a hearing, to dismiss pharmacy student convicted of intent to distribute cocaine under rule permitting summary dismissal for conviction of criminal offenses interfering with educational or orderly operation of university or endangering the health, safety or property of members of the academic community.

f. Hart v. Ferris State College, 557 F. Supp. 1379 (1983). College entitled to conduct disciplinary hearing relative to student arrested for sale of illegal drugs, where student would have opportunity to address the question of whether the offense charged materially and adversely affected her suitability was a member of the college community.

IV. UNIVERSITY LIABILITY FOR FRATERNITIES AND SORORITIES.

A. Generally speaking, legal relationships between a university and fraternities and sororities (i.e. student organizations) raises the same issues as the relationships between the college and individual students. Thus, colleges ordinarily have no duty to regulate the personal, extracurricular conduct of their students.(See, e.g., Whitlock v. University of Denver, 744 P.2d 54 (Colo. 1987); Campbell v. Board of Trustees, 495 N.E.2d 227 (Ind.App. 1986);Bradshaw v. Rawlings, supra.; Mazart v. State of New York, 441 N.Y.S.2d 600 (Ct. Cl. 1981).

B. Whether a university will be held liable for the conduct of a fraternity or sorority is often determined by examining the extent to which the institution supervised or attempted to supervise either the specific conduct in question or conduct in general. (See, e.g., Whitlock, id; Mazart,id.; also see, Furek v. University of Delaware, C.A. No. 82C-SE-30 (Del. Super. Ct. Jan. 9, 1986),(Universities' motion for summary judgment denied on grounds that although it had banned fraternity hazing, student was suing as a result of injuries suffered during a fraternity hazing)).

C. Where a university attempts to supervise fraternities and sororities by implementing educational policies encouraging responsible conduct courts have shown a willingness not to hold universities liable for injuries resulting from misconduct. (Id.).

D. Universities wishing to implement supervisory policies must bear in mind that policies in place but not enforced can be more dangerous than never having had the policy in the first place.

E. If universities are not inclined to such supervisory policies they must make it clear that theirs is not an agency relationship with fraternities and sororities.

1. Formal recognition procedures should state that only the specifically indicated privileges apply and that recognition does not constitute approval, endorsement, sponsorship or acceptance of liability for the actions of such organizations.

2. These guidelines should also make it clear that fraternities and sororities are not to advise or mislead third parties into believing that they are agents of the university.

3. Where universities provide purchasing and financial management services for fraternities and sororities it should be made clear in contract documents that the organizations and not the university are responsible for compliance.

V. Conclusion.

In loco parentis is a dead issue. The past decade has seen a rise in student and third party law suits against colleges and universities, however, the basis of those actions is common and well established tort liability theories applied to the university setting rather than the old or any new theory of in loco parentis.

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PRIVATE LIVES IN PUBLIC PLACES: CONTROL AND REGULATIONS OF STUDENT BEHAVIOR

July 1, 1989

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I. AN INTRODUCTION TO THE TOPIC

A. There is a definite relationship between current student values, behavior and culture to institutional policy.

B. Several areas in student affairs are especially involved with policy development and subsequent legal issues today.

1. Fraternities and Sororities - With recent changes in student interest and subsequent policy modifications Greek organizations are the focus of new policy development and litigation.
2. Alcohol and Drugs - In the last decade the use and abuse of alcohol and drugs have played a significant role in campus policy and subsequent enforcement.
3. Relationship with the Community - New student values have exacerbated conflicts between institutions and the surrounding communities.
4. Campus Activism - On some campuses there is a return to student activism in response to institutional policies, national, and global issues.

C. The New In-Loco Parentis

1. Understanding new student values and behavior lays a foundation to address the concept of the return to the institutional philosophy of in-loco parentis. Is this an actual return to the in-loco parentis?
2. How are student values and behavior linked to institutional philosophy, policy and enforcement? What are the educational implications?

II. STUDENTS TODAY FROM A STUDENT AFFAIRS PROSPECTIVE

A. More diversity in student profiles.

1. Older, Non-Traditional Aged Students: Many campuses have changed to the point where the average of freshmen is approaching 30 years of age. This change is most significant in urban, public institutions. Even at non-urban institutions it is not uncommon to have 20 to 30 percent of the student body over the age of 23. This older group has had an impact on policies, practices, curriculum and support services.

2. Increase in the numbers of ethnic minorities: In some states this change has been dramatic. It is projected that by the year 2000 one-third of the nation will be composed of minority citizens. By 2000, 23 of the 25 largest cities in America the minority population will exceed 50%. Although ethnic diversity in higher education has not kept up with the general population growth, the impact of the influx of minority students into higher education during the next decade will have a significant impact.

3. Most universities are composed of students geographically representing the entire nation: At most institutions students are being drawn from a national applicant pool. Most state universities have gone from having a relatively small percentage of non-resident students to increasingly higher percentages. This change has fostered more diversity in values and campus culture on scores of campuses.

B. Academic profile and family description has changed significantly:

1. Students today come into college better prepared academically than ever in history: Despite the recent concerns for the quality of the secondary school experience, most students entering college are better prepared for the collegiate academic experience than ever before. Most institutions have raised admissions standards and high schools have respond with changes in curriculum and course requirements for college preparatory students.

2. More students are entering college from families where at least one parent is a college graduate: Students entering college today are the children of the "baby boom" generation. Increasingly, their parents are college graduates that have an expectancy for quality higher education for their sons and daughters.

3. A significant number of students today are from divorced or single parent families: On some campuses the number of students from divorced or single parent families now exceeds 50%. These students are different in their

values and expectations of collegiate experience. They have special needs for support, community, group membership and psychological services.

4. Students today have a rich base of pre collegiate experiences: Most students arriving at college today have traveled extensively, have read widely and have lived in different areas of the country. Forty percent of today's families have moved at least once in the past five years and 25% have moved at least twice. The media, television and computers have also had a significant impact on experience, values and behavior.

5. Freshmen today are more likely to be developmentally ahead of their agemates of a decade ago: Freshmen have developed more rapidly through an intense and varied set of junior and senior high school experiences. They have had earlier sexual experiences, developed more vocational options, and have experimented with cults, religion, drugs, and alcohol. Many have lived away from home, and traveled alone in other countries.

6. Students and families today are good consumers: Most students are better consumers than their counterparts a decade ago. They expect a great deal from their institutions for a variety of reasons. Families and students are more likely to sue if they feel the institution is not accepting responsibility for providing quality educational experiences and support services along a safe campus environment.

III. STUDENTS IN COLLEGE TODAY HAVE VALUES THAT REFLECT THE VARIED PROFILE OF THE GROUP.

A. Liberal or Conservative

1. Students are politically conservative as a group: Much has been written in the popular media on this topic. There is a rise in far right political groups on campus. Often these groups are taking the form of Neo-Nazi groups, KKK splinter organizations and "skin head" groups.

2. Students are personally moderate or liberal as a group: Even though students today reflect moderate to right-wing politics, they are moderate to left-wing in the personal conduct and behavior. Personal use of alcohol, drugs and sexual behavior reflect fairly liberal personal values. Some authors suggest for the first time in history this dichotomy is being noted.

B. Concern for Self

1. Students are primarily concerned about self interests: Students are concerned over their health and fitness, their living space, material possessions, significant spending money and majors that will allow them to be financially successful as soon as possible after graduation. Even though this is true, the pendulum has begun to swing back after peaking with the "me" generation of the early 1980's.

2. Students are pragmatic: Students today are very pragmatic and less philosophical. Students show that they would rather earn money than have a meaningful philosophy of life after graduation.

3. Students are pessimistic about the world and America and optimistic about their own future: For the first time in decades students are cynical and pessimistic about the future. They cite problems of national debt, the environment, toxic waste, atomic destruction, AIDS, and racial conflict, yet most students feel they will be personally successful in the future.

4. Most students are career driven: The "new vocationalism" probably peaked in the mid - 1980's, but students are still very concerned over their careers and the monetary value of their degree. These thoughts form the dynamic that leads to the rise of consumerism.

C. Traditional Values are Accepted.

1. Most students are supporting traditional American values: Most American values for family, behavior and religion are accepted and endorsed by students today.

2. There are no "heros": Most students today have no heros especially in public service, government, or education. When asked about their heros, media personalities or movie stars are indicated as heros. Students are cynical about public leaders and most do not aspire to these roles.

3. Most students have a great need for community: Students want to be a part of communities. This is a reason for the popularity of living on campus, return to fraternity and sorority life and the growth of student organizations.

IV. CYCLES IN STUDENT VALUES AND BEHAVIOR

A. Author Arthur Levine suggests a model to explain cycles in student behavior.

1. Periods of Individual Ascendancy: During these periods students are concerned for self, pragmatic, conservative, vocational and career driven, and interested in religion and traditional American values.

2. Periods of Community Ascendancy: During these periods students are liberal, concerned about society and others, non materialistic, and challenge traditional America values.

B. Today American college students are in a period of change between cycles: Students are at different places in the cycle in different institutions during this change period. This period is characterized by presence of both liberal and conservative attitudes, no heros or clear role models, beginnings of student activism, reactionary right and left-wing groups and lack of clarity in institutional/student relationships.

V. WHAT ARE IMPLICATIONS FOR HIGHER EDUCATION?

A. Fraternities and Sororities

1. return to popularity
2. shift in policy, relationship to institution
3. redefinition and discussion of legal stance
4. new Greek values rising from the 1950's and 1960's
5. link to educational process

B. Alcohol and Drugs

1. change in legal age
2. institutional response
3. educational implications
4. responsibility of the institution

C. Relationship with the Community

1. new problems from old issues
2. what is the ideal relationship
3. new students role as citizens and volunteers
4. shift in student attitude
5. National Youth Service concept

D. Campus Activism

1. slow return to old cycle
2. new relationship to institutions
3. issue driven
4. campus specific - activist profile
5. response today vs the 1960's

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HIGHER EDUCATION LAW: AN OVERVIEW AND UPDATE
A PROGRAM FOR LAWYERS NEW TO THE FIELD OF HIGHER EDUCATION

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DEALING WITH STUDENTS: DISCIPLINE PROBLEMS

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I. The Issues of student misbehavior and student discipline are not new.

> The article of discipline is the most difficult in American education. Premature ideas of independence, too little repressed by parents, beget a spirit of insubordination, which is the great obstacle to science with us and a principle cause of its decay since the revolution. I look to it with dismay in our institution, as a breaker ahead, which I am far from being confident we shall be able to weather.
>
> -- Thomas Jefferson, Founder of the University of Virginia, to Thomas Cooper, Second President of the University of South Carolina, November 2, 1822.

II. The general legal doctrines which have been applied to student discipline matters have changed over the years.

A. The "initial" concept is that of in loco parentis: literally, in the place of a parent. Under this doctrine, courts tended to give colleges a side deal of discretion in dealing with discipline issues.

1. Gott v. Berea College., 156 Ky. 376, 161 S.W. 204 (1913).

2. Kaplin, Law on Campus 1960-1985: Years of Growth and Challenge, 12 J.C.U.L. 269, 272 (1985).

3. Note, Reasonable Rules, Reasonably Enforced -- Guidelines for University Disciplinary Proceedings, 53 Minn. L. Rev. 301, 310 (1968).

B. A more recent view, crystallized in the 1960's is to consider the student/institutional relationship as a contractual one. Under this view, when a student pays certain fees, he agrees to obey certain specified rules and gets educational services in exchange. Under this contractual view, courts tended to give college administrators less deference than under the doctrine of in loco parentis.

1. Corso v. Creighton Univ., 731 F.2d 529 (8th Cir. 1984).
2. Cloud v. Trustees of Boston Univ., 720 F.2d 721 (1st Cir. 1981).
3. Nieswand v. Cornell Univ., 629 F. Supp. 1464, 1470-71 (N.D.N.Y. 1988).
4. Merrow v. Goldberg, 672 F. Supp. 766, 774 (D. Vt. 1987).
5. Russell v. Salve Regina College, 649 F. Supp. 391, 405 (D.R.I. 1986).
6. Dartmouth Review v. Dartmouth College, No. 88-E-III, slip. op. at 13 (New Hampshire Super. Ct. January 3, 1989).
7. Pruseck v. State, 117 A.D. 2d 729, 498 N.Y.S. 2d 455 (1986).
8. Barker v. Trustees of Bryn Mawr College, 278 Pa. 121, 122 A. 220 (1923).
9. Jennings, Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed?, 7 J.C.U.L. 191 (1981).

C. In addition, courts have required colleges to give students certain "rights" (such as notice and a hearing) prior to imposing the sanction of dismissal.

1. E.g. Commonwealth ex rel. Hill v. McCauley, 3 Pa. County G. 77 (1887) (Dickinson College, a private school).
2. The "landmark" case extending this concept to public institutions is Dixon v. Alabama Board of Education, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).
3. Reidhaar, The Assault on the Citadel: Reflections on a Quarter Century of Change in the Relationships Between the Student and the University. 12 J.C.U.L. 343, 346 (1985).

4. Wright, The Constitution on Campus, 22 Vand. L. Rev. 1027, 1031-32 (1969).

5. The general principle that "due process" requirements apply only to state schools or to private schools with enough interaction with the state to constitute "state action" is an old one -- but one which still engenders debate. For a comprehensive recent discussion of the decisions on this issue, see Boehm v. University of Pennsylvania School of Veterinary Medicine, No. 2563 Phila. 1989, slip op. (Pa. Super. April 18, 1990).

    a. Silets, Of Students' Rights and Honor: The Application of the Fourteenth Amendment's Due Process Strictures to Honor Code Proceedings at Private Colleges and Universities, 64 Denver Univ. L. Rev. 47 (1987).

    b. Thigpen, The Application of Fourteenth Amendment Norms to Private Colleges and Universities, 11 J.L. & Educ. 171 (1982).

    c. Annot., Action of Private Institutions of Higher Education as Constituting State action or Action Under Color or Law for Purposes of the Fourteenth Amendment and 42 U.S.C. §1983, 37 A.L.R. Fed. 601 (1978).

    d. Recent cases of students asserting constitutional claims against private schools: Albert v. Carovano, 851 F.2d 561 (2d Cir. 1988); Cummings v. Virginia School of Cosmetology, 466 F. Supp. 780 (E.D. Va. 1979); Miller v. Long Island Univ., 85 Misc. 2d 393, 380 N.Y.S. 2d 917 (Sup. Ct. 1976).

The above cases are the historical backdrop for all the legal issues which arise in student discipline cases although a case can be made for the proposition that, given a reasonable chance, courts will give colleges a wide degree of discretion in discipline cases. E.g., Schulman v. Franklin & Marshall College, 538 A. 2d 49, 52 (Pa. Super 1988).

III. Is a written student code required or desirable?

  A. At least one court has required a written student code, at a state institution. Solgin v. Kauffman, 418 F.2d 163, 166-67 (7th Cir. 1969).

  B. Most agree that it is desirable to provide a written student code, even if written codes usually result in providing students with more rights than the Constitution requires. Wright, The Constitution on Campus, 22 Vand. L. Rev. 1027, 1035 (1969).

C. "Although the trend toward written codes is a sound one, legally speaking, because it gives students fairer notice of what is expected from them and often results in a better conceived and administered system, written rules also provide a specific target to aim at in a lawsuit." W. Kaplin, The Law of Higher Education at 292 (2d. ed. 1985).

Thus, one must be careful to follow the procedures set forth in the student code, apart from the dictates of Constitutional considerations.

1. Tedeschi v. Wagner College, 49 N.Y. 2d 652, 658-60, 404 N.E. 2d 1302, 1305-06 (1980).
2. VanLook v. Curran, 489 So. 2d at 528.
3. Clayton v. Trustees of Princeton Univ., 608 F. Supp. 413, 435-36 (D.N.J. 1985).
4. Mites, The Due Process Rights of Students in Public School of College Disciplinary Hearings, 48 Ala. Lawyer 144, 146 (1987).
5. Picozzi, University Disciplinary Process: What's Fair, What's Due and What You Don't Get, 96 Yale L. J. 2132, 2155 (1987).

IV. When all is said and done, counsel at state (or under color of state law) institutions must always keep in mind that the Constitution is in the picture. This can lead to some surprising results, even when one's motivation is clearly correct. E.g. Doe v. University of Michigan. No 89-71683 slip op. (E.D. Mich. Sept. 17, 1989).

V. Certain issues recur in many cases -- and there is at least some guidance available.

A. May someone serve on a student code panel if he/she knows the student outside of the context of disciplinary proceedings?

1. Nash v. Auburn Univ., 812 F.2d 655, 666 (11th Cir. 1987) (Yes).
2. Gorman v. University of Rhode Island, 837 F.2d 7, 15 (1st Cir. 1987) (Yes).
3. Swem, Due Process Rights in Student Disciplinary Matters, 14 J.C.U.L. 359, 372 (1987) (Questioning).

B. A person may serve in more than one capacity in the disciplinary process. Even though this is not ideal, courts recognize that colleges are limited in their personnel resources. Thus, this is permitted, generally, absent proof of a basis for a claim of actual bias.

1. Winnick v. Manning, 460 F.2d 545, 548 (2d Cir. 1972).
2. Gorman v. University of Rhode Island, 837 F.2d 7, 15 (1st Cir. 1987).
3. Killman v. Elliott, 436 F. Supp. 812, 816 (W.D. Va. 1977).
4. Barker v. Hardway, 283 F. Supp. 228, 237 (S.D. W. Va.) aff'd 399 F.2d 638 (4th Cir. 1968), cert. denied 394 U.S. 905 (1969).
5. Compare Dartmouth Review, supra, slip op. at 18.

C. May a college discipline students for off-campus conduct. Generally, the answer appears to be "yes," but it is clearly advisable to be able to show that there is a nexus of the conduct to the campus community.

1. "Obviously, a college has a vital interest in the character of its students, and may regard off-campus behavior as a reflection of the student's character and his fitness to be a member of the student body." Kusnir v. Leach, 64 Pa. Commw. 65, 69, 439 A.2d 223, 226 (1982).
2. Esteban v. Central Missouri State College, 415 F.2d 1077, 1088-89 (8th Cir. 1969).
3. Hart v. Ferris State College, 557 F. Supp. 1379 (W.D. Mich. 1983).
4. Sohmer v. Kinnard, 535 F. Supp. 50 (D. Md. 1982).
5. Wallace v. Florida A & M Univ., 433 So. 2d 600 (Fla App. 1983).
6. Annot., Misconduct of College or University Student Off Campus as Grounds for Expulsion, Suspension or Other Disciplinary Action. 28 A.L.R. 4th 463 (1984).

D. Is it advisable to withhold campus disciplinary action if criminal prosecution is in the picture?

1. One commentator says: Yes. Richmond, Students' Right to Counsel in University Disciplinary Proceedings, 15 J.C.U.L. 289, 312 n. 166 (1989).

2. That is not the view of this speaker: E. Stoner & K. Cerminara, Harnessing the "Spirit of Insubordination", J.C.U.L. at n. 48 (Fall 1990) (advocating going ahead especially in important cases).

3. In any event, one is not required to abstain from taking disciplinary action until criminal processes are completed.

    a. Gabrilowitz v. Newman, 582 F.2d 100, 104 (1st Cir. 1978).

    b. Furutari v. Ewigleben, 297 F. Supp. 1163 (N.D. Cl. 1969).

    c. Goldberg v. Regents of Univ. of California, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

    d. Nzuve v. Castleton State College, 113 Vt. 225, 335 A.2d 321 (1975).

E. Is a student entitled to bring his/her personal attorney to the disciplinary hearing?

1. No.

    a. Madera v. Board of Education, 386 F. 2d 778 (2d Cir. 1967), cert denied 390 U.S. 1028 (1968).

    b. Everett v. Marcase, 426 F. Supp. 397 (E.D. Pa. 1977).

2. Yes.

    a. Marin v. University Puerto Rico, 377 F. Supp. 613, 623-24 (D.P.R. 1974).

    b. Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972).

    c. French v. Bashful, 303 F. Supp. 1333 (E.D. La. 1969).

    d. Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo.) aff'd 415 F.2d 1077 (8th Cir.), cert. denied, 398 U.S. 965 (1970).

F. Does a student have a "right" to cross-examine witnesses in the disciplinary hearing?

1. No.

   a. Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987) (approving submission of written questions).

   b. Wimmer v. Lehman, 705 F.2d 1402, 1406 (4th Cir. 1983).

   c. University of Houston v. Sabati, 676 S.W. 2d 685, 689 (Tex. Ct. App. 1984).

   d. Gorman, supra, 557 F. Supp. at 1386-87.

2. Yes.

   a. Keene v. Rodgers, 316 F. Supp. 217, 221 (D. Me. 1970).

   b. Speake v. Grantham, 317 F. Supp. 1253, 1258 (S.D. Miss.), aff'd per curiam 440 F.2d 1351 (5th Cir. 1971).

G. On a practical level, school are well advised to avoid incorporating criminal law language into their civil student code processes. The issue always is whether a student violated the code standards and is susceptible to normal civil law language and standards. Terms to avoid include: "defendant," "guilt," "guilty," "prosecutor," "beyond a reasonable doubt," "innocent."

As to the standard of proof, any standard more still than "more likely than not" is not fair to students who contend they were victims of misconduct. There are cases supporting this view.

1. Sill v. Pennsylvania State University, 462 F.2d 463, 467 (3d Cir. 1972).

2. Speake, supra, 317 F. Supp. at 1281-82.

3. Jones v. State Board of Education, 407 F.2d 834, 836 (6th Cir. 1969).

4 Keene, supra, 316 F. Supp. at 221.

5. Esteban, supra, 415 F.2d 1077, 1080-090.

6. *But see*, *Smyth v. Lubbers*, 398 F. Supp. 777, 797 (W.D. Mich.) (advocating "clear and convincing" where violation alleged also would be a crime).

7. *But see*, Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J.C.U.L. 71 (1985) (clear and convincing).

H. A student may be suspended, without a hearing, in emergency situations. A hearing should follow as soon as possible, however.

1. *Goss*, *supra*, 419 U.S. at 582-83.

2. *Loudermill*, *supra*, 470 U.S. 532, 545.

3. *Picozzi*, *supra*, 96 Yale L. J. 2132 at 2158 n. 111.

I. What follows next is a copy of an educational item I prepared in the early 80's. At Duquesne, we use it as part of the orientation process for new members of the student judicial boards. Of course, there have been additional legal decisions since this was written but this will give you an idea of the type of thing which might be helpful to your campus.

DUE PROCESS AND THE DUQUESNE UNIVERSITY JUDICIAL SYSTEM: AN INTRODUCTION

The fourteenth amendment to the United States Constitution provides that no State shall deprive any person of life, liberty, or property without due process of law.

This statement may seem to be an odd place to begin a discussion of the Duquesne University Judicial System since Duquesne is clearly not a "State".

In today's society, however, courts have recognized that a university education is very important and that a decision depriving a student of the opportunity to continue his or her education may limit that student's liberty. Indeed, serious misconduct may seriously limit a student's academic "freedom". Accordingly, the courts have held that--at State schools--a denial of the opportunity to continue one's education must be accompanied by due process of law. That standard has been applied repeatedly to disciplinary proceedings initiated at State-related schools.

Although Duquesne University is a private institution, it is probable that it will be held to that same standard if not by Constitutional requirement, then by a judge's seasoned view of what is "fair". As we all know, moreover, the government is increasingly involved in the day-to-day workings of even private American universities. The degree of government intervention in university-level education has reached such a level that one legal writer, Professor Charles Wright, has questioned whether a truly "private" university is to be found in the United States.[1] He reaches this decision -- one which many view as contrary to basic notions of academic freedom -- because the State and many universities have entered into a

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[1] Wright, "The Constitution on the Campus", 22 Vanderbilt Law Review 1027 (1968).

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relationship of mutual dependence. Mr. Wright notes that the government provides necessary funding and the private university performs what is increasingly being thought of as an essentially governmental function, education. These perceptions may be wrong -- both in terms of how Duquesne operates (if any school is still a private school, Duquesne is) and in terms of what "should" be -- from the academic freedom perspective. In any event, Duquesne University recognizes the importance of due process -- (even though Duquesne is not a State!) -- and its Student Code acknowledges that University disciplinary matters are subject to certain elements of "due process". (Article VI-A-2). Of course, the best way for the Duquesne community of scholars to avoid government involvement (whether by courts or bureaucrats) is to have a fair system by which we regulate our own affairs. The Student Code is that system and it has been respected both by government agencies and courts in the rare occasions it has been challenged.

Because the Student Code is a fair procedure, any time a court is asked to review a Student Code proceeding, the court will be most concerned that the judicial body abided by the Student Code. Only secondarily will it concern itself -- if at all -- with constitutional concepts of "due process". Thus, we will discuss some basic notions of due process -- ones covered by the Student Code.

THE ELEMENTS OF DUE PROCESS

Even where there is the required "State" action, the United States Supreme Court, in 1960, had this to say about due process:

> "Due process" is an elusive concept. Its exact boundaries are undefinable and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on the proceeding, are all considerations which must be taken into account.[2]

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[2] Hannah v. Larche, 363 U.S. 420, 442 (1960).

The precise requirements of due process are, by necessity, flexible and must be tailored to the circumstances of each case. "Basic fairness and integrity of the fact-finding process are the guiding stars."[3]

In litigation involving student codes (usually in State-related schools), the courts have been cautious when applying the due process standard to the disciplinary proceedings of a university judicial board. They have emphasized repeatedly the flexibility of that standard. They have been reluctant to formalize university proceedings overly and have attempted to avoid interference with the primary function of the university, education. As long as the proceedings follow basic standards of fairness and do not result in arbitrary decisions, the discretion of judicial boards generally has been respected.

Although the requirements of basic fairness will vary with each set of facts, certain safeguards have appeared repeatedly in judicial guidelines. Each of these safeguards will be discussed below and should be denied by the judicial body only after the interests involved have been carefully weighed and it has been determined that such denial is necessary. Under the Duquesne Student Code, an experienced judicial advisor is available at all hearings and one of the advisor's roles is to assist the board in assuring that the "right" decisions are made to best safeguard everyone's rights under the Code.

A. Adequate Advance Notice

Almost all courts agree that due process requires that a student be given adequate notice prior to a disciplinary decision. Opinions vary, however, on the nature of that requirement. Notice is not merely a technicality. Proof that notice has been given is insufficient where it appears that the student did not understand the content of the notice. A few courts have required written notice but, in general, any notice that brings the complaint to the attention of the student usually satisfies due process. However, even if written notice is not required, it would be to the advantage of all the parties involved to commit each element of the notice to writing. This would facilitate a more effective and efficient review of the case if the decision is appealed.

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[3] Boykins v. Fairfield Bd. Ed., 492 F.2d 697

Generally, to meet the requirements of due process, the notice must include a statement of specific charges and grounds which would justify punishment under specified school regulations. In addition, in order to assist the student in the preparation of his or her case, the notice should indicate the nature of the evidence that is to be introduced against the student. The student should be provided with the names of the witnesses against him or her and an oral or written report on the facts to which each will testify, especially in instances in which the accused student will not be given the opportunity to confront the witnesses unless he/she requests that the witnesses be present. Furthermore, where applicable, the notice should inform the student of the right to examine affidavits or exhibits. These requirements currently are handled in the pre-hearing proceedings by a representative of the Dean of Students.

Due process, however, does not require that the student be given this information in all instances and allows the judicial body to be sensitive to the need for confidentiality. The board must weigh, in each instance, the accused student's need to know with the witness's need for confidentiality. When the latter is overriding, the judicial body may take precautions to protect that confidentiality as long as the accused is not denied an opportunity to prepare his or her case properly.

Due process also requires that the notice be timely. The student must, in all instances, be given a sufficient time to prepare a defense. In determining what is sufficient, the judicial body should consider the nature of the charge, the types and sources of evidence the student would need to disprove the charge, and the probability that the student will be assisted by an attorney. Accordingly, the time period required by due process will vary with the facts of each case.

Duquesne's Student Code provides this necessary flexibility. Article IV-B-3 states that:

> All charges shall be presented to the accused student in written form. A time shall be set for a hearing which shall not be less than five nor more than fifteen calendar days after the student has been notified.

Furthermore, the maximum time limit for scheduling the hearing may be extended at the discretion of the Dean of Students.

B. Adequate Hearing

Due process also requires that the student be given a hearing at which he is given a fair and sufficient opportunity to present the facts, to deny the charges, or to explain his behavior. Although all courts have recognized that some sort of hearing is necessary as a fundamental procedural safeguard, different courts have looked at different facts to determine if the hearing satisfied due process.

1. Opportunity To Present A Defense And To Call Witnesses.

Virtually all courts require that a student be afforded an opportunity to present a defense. It is basic to American concepts of fairness to allow the accused a chance to present his or her version of the facts and the conclusions to be reached from those facts. The courts are divided, however, on whether the accused student must have an opportunity to present witnesses and affidavits in support of his or her argument. In a 1975 decision, Goss v. Lopez, the United States Supreme Court stopped short of requiring that the student be given an opportunity to call witnesses but suggested that under different fact situations (e.g. where the penalty was more severe), such an opportunity might be essential to due process. Accordingly, several courts have held that a disciplinary board should have afforded an accused student the opportunity to present witnesses.

Duquesne's Student Code reflects the current state of the law in this area. Article VI-B-4(d) states that the "accused is responsible for presenting his/her own case" and (e) and (f) provide that the accused shall have the "privilege of presenting witnesses subject to the right of cross examination by the judicial body" and that "pertinent records, exhibits and written statements may be accepted as evidence for consideration at the discretion of the chairperson." A due process problem in this area could arise only if the chairperson improperly excludes evidence offered by the accused. It is not frequent that the chairperson must exclude evidence--but it does happen (for example, when a witnesses is far off the subject or is being unnecessarily repetitive). If the chairperson continues to be sensitive to allowing accused students some leeway in their defense and continues to exclude evidence only after careful deliberation and consideration of the seriousness of the accusation, it is unlikely that a problem would arise.

2. Impartial Tribunal

Fundamental fairness requires that the innocence or guilt of the accused be determined by an impartial tribunal. Generally, the courts presume that the judicial body was impartial and accordingly, the burden of showing that the decisionmaker was biased is placed upon the student. The judicial bodies at Duquesne follow the excellent practice of asking each accused student--on the record and before the hearing begins--whether he wishes to challenge a person's impartiality.

In the case of student disciplinary boards, an exceptionally strong case must be made before the courts are willing to find bias because a disciplinary hearing is not held to the same standards of impartiality as is a trial in a court of law. For example, courts have determined that mere participation in an earlier stage of an investigation does not disqualify a person from hearing the case as a member of the judicial body. Bias has been found only in extreme situations, such as where the prosecutor also acted as counsel to the judicial body. (Duquesne's system, of course, has no prosecutor as such.)

The courts have yet to consider the composition of the tribunal in a due process context. The courts have only noted that a board consisting of both students and faculty is to be preferred over a board strictly composed of faculty members. The obvious policy behind that preference suggests that an "ideal" board would probably be representative of the academic community. Idealism, however, is not currently required by due process and, as long as the composition of the board does not result in obvious bias, it is not violative of due process. The Student Code's procedures and the Dean of Students' practices in composing boards are reasonable and comply with general requirements of due process.

3. Closed v. Public Hearing

In deference to the rights of the accused, the courts have generally supported private disciplinary proceedings and have held that holding such hearings in private does not violate due process. In fact, because of the 1974 Family Education Rights and Privacy Act (Buckley Amendment), some hearings must be closed if the results are in any way to become part of a student's academic record.

Even in those cases in which the students requested an open hearing and it was determined that the student was entitled to such a hearing, the courts have permitted a closed proceeding when justified by countervailing considerations, such as campus unrest or the potential for politicizing the case. An open hearing under those circumstances would disrupt the academic function of the university and it is unlikely that any court would hold that such disruption is required by due process.

The courts, however, have looked favorably upon open hearings when the case involved was already notorious. A public hearing in that situation is likely to dispel any notion of secret persecution and would strengthen the credibility of the student judicial system.

Article VI-B-4(a) and (b) of Duquesne's Code minimizes the possibility of a due process violation in this area. In accordance with the Code, hearings are normally closed but, when the accused so requests, the judicial body may decide to admit a representative of the student press. As long as the judicial body denies requests for the admission of a student press representative only after carefully examining the circumstances and determining that the interests favoring a closed proceeding outweigh the student's interest in a public trial, it is not likely that a court would find any violation of due process.

4. Availability of Counsel

Generally, a person is entitled to use legal counsel whenever there is a threat to his or her liberty. In a 1932 criminal decision, Powell v. State of Alabama, the United States Supreme Court noted that "[t]he right to be heard would be of little avail if it did not comprehend the right to be heard by counsel."[4]

In student disciplinary proceedings, however, the courts have been reluctant to require the judicial boards to afford the student the opportunity to seek legal representation. Of course, student code proceedings are not criminal in nature. Some courts fear that the presence of attorneys would create an unnecessary adversarial atmosphere and would increase the potential for quibbling over unimportant issues and thereby prolong the hearing, increasing its cost and exacerbating its disruptive effect. Furthermore, if the students are represented by lawyers, it is feared that it will soon become necessary for the university to obtain legal counsel to represent its interest at the hearings. All of this adds up to increased time, costs, and formality and, therefore, the courts have been willing to require an opportunity to seek legal assistance only in cases in which the potential consequences of the decision would be extremely serious.

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[4] Powell v. State of Alabama, 287 U.S. 45 (1932).

In deciding whether a student should have been permitted to seek legal representation, the courts have considered a number of factors. They have examined the complexity of the facts, the potential punishment, and the maturity and education of the accused student (e.g. is the student likely to make admissions contrary to his or her interest?). In addition, they have considered whether the university was represented at the hearing by an attorney and whether the proceeding was investigative, noncriminal and non-adversarial. In cases in which legal assistance is necessary for the protection of the student, several courts have attempted to minimalize the undesirable effects of that representation by permitting the student's attorney to participate only indirectly in the proceeding.

Duquesne's Student Code closely follows that compromise. Article VI-B-4(d) provides that the accused has the right to be assisted by an advisor. It is up to the student to determine if he wants an attorney to be his advisor and, if so, it would be at the student's expense. The role of that advisor, however, is limited whether he is an attorney or not. The advisor is not permitted to speak or to participate directly in any hearing before a judicial body. Even in this limited capacity, however, the attorney is able to offer protection to the student from the abuses of the system. Furthermore, the mere presence of counsel creates a presumption that the proceeding was fair.

The degree to which Duquesne permits legal assistance appears to be in line with due process as it is presently interpreted. Problems might occur only if the accused student is incapable of presenting his or her own case. The circumstances under which the student would be incapable of presenting his or her own case are probably rare and doubtless those problems will be apparent and may be dealt with before any hearing occurs.

It has been suggested (probably by those wanting to create more work for lawyers!) that a student is entitled to university-appointed counsel. It is not likely that a court would find that such an extreme and expensive scheme is necessary to satisfy due process. Administratively, the program would be very difficult to administer because the university's familiarity with lawyers, unlike the courts', is rather limited and the cost of providing an attorney to students would be prohibitive--even at a State school, which Duquesne is not. In light of the connection between due process and fundamental fairness, it is unlikely that the courts would impose such a burden on the university.

5. Opportunity For Confrontation And Cross-Examination.

In another criminal case, Pointer v. Texas, the United States Supreme Court expressed the belief "that the right of confrontation and cross-examination is an essential and fundamental requirement of the kind of fair trial which is this country's constitutional goal."[5] Recent decisions on non-criminal student behavior cases, however, have stopped short of requiring an opportunity for cross-examination in every instance. Where the potential punishment is severe, however, the courts have held that due process requires an opportunity for cross-examination.

The courts have generally realized that routine cross-examination, if not reasonably restrained, might be detrimental to the college's educational atmosphere, might substantially lengthen the proceeding, and might irreparably affect the student's relationship with the school. Therefore, due process requires a reasonable opportunity to cross-examine only in certain cases and, in those cases, the tribunal must closely monitor abuse. Furthermore, the opportunity to cross-examine is never required in instances in which cross-examination would inhibit rather than advance the search for truth.

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[5] Pointer v. Texas, 380 U.S. 400 (1965).

Generally, however, the courts have preferred to limit the scope of the cross-examination rather than bar it completely. In some cases, for example, the courts require that only the student (and not his attorney) be given an opportunity to cross-examine witnesses. Similarly, one commentar, Professor Buss, suggests that to prevent a due process violation, the tribunal should hear the witness's testimony, determine its importance, and weigh the interests of the accused student and the witness.[6] For example, where the testimony is particularly important and the case resolves itself into what is essentially a question of credibility, the need for an opportunity to cross-examine is particularly important and usually the interest of the accused student predominates.

For similar reasons, the courts have generally held that due process requires that a student judicial board refuse to consider hearsay (e.g. testimony by B in the hearing to what he has heard C say elsewhere). Although most courts have held that strict adherence to common law evidence rules is not required, they have often stated that due process does not permit admission of evidence offered by witnesses that are neither under oath nor subject to cross-examination unless the accused student is given an opportunity (preferably in advance) to correct this problem. A few courts have held that the exclusion of hearsay testimony is not an invariable requirement of due process and that such exclusion is required only when there is a factual dispute on a critical issue. In light of these conflicting opinions, a judicial board concerned about avoiding due process violations should admit hearsay evidence only under extraordinary circumstances and after careful consideration. Experience at Duquesne has shown that judicial boards have exercised good judgment about cross-examination and hearsay points in the past and it has not been a problem.

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[6] Buss, "Procedural Due Process for School Discipline: Probing the Constitutional Outline", 119 University of Pennsylvania Law Review 545 (1971).

6. Record

Many courts have suggested that due process requires that there be a verbatim record of all proceedings before the judicial board. Failure to record the proceedings, however, has not yet been found to be grounds for reversal of a judicial board's decision. When the question has arisen, several courts have required that a record, either stenographic or tape-recorded, be made in the future.

The courts have stressed the recording of proceedings because the availability of a record enables a reviewing court or judicial body to determine whether the student received adequate notice and whether the student had a fundamentally fair hearing. In addition, the record enables the accused student to check the record for errors and provides a check on the judicial body. Moreover, the courts have emphasized the need for a record of the proceeding because a record serves as evidence of good faith and often provides a defense to any allegations of unfairness. In sum, the recording of a proceeding is an effective procedural safeguard.

Finally, in most cases, if a record is taken of the proceedings, a reviewing court will not be likely to hold a "new" hearing of its own but will review the testimony given in the student court hearing.

Duquesne's Student Code satisfactorily provides for this safeguard. Article VI-B-5 states that there shall be a single verbatim record of all hearings before a judicial body and also provides that the record shall be the property of the University. The court in Esteban v. Central Missouri State College, an often cited case in the due process area, stated that, in the interests of due process, either side may record the proceeding at its own expense. The Student Code's provision that there be only one verbatim record, which is to remain in the possession of the University, should not pose a due process problem as long as the accused student's access to the record is not unreasonably limited. The purposes for which a record is required would not be served if the student were denied the opportunity to examine the record. This is why students are allowed access to the tapes in preparing their appeals, even though few take advantage of the availability of the tapes.

7. Freedom From Self-Incrimination

Many courts have held that student judicial boards need not provide rules protecting the student from self-incrimination because the nature of the disciplinary hearing is non-criminal. As the court stated in Buttny v. Smiley:

> "[w]e know of no legal authority that requires university officials to advise a student involved in disciplinary proceedings of his right to remain silent . . . ."[7]

Due process may require, however, that the judicial body take precautions against self-incrimination in instances in which a criminal case is pending against the student arising out of the same facts that give rise to the disciplinary hearing. These precautions will be discussed if the situation arises but they do not mean that the Student Code hearing must be delayed pending a criminal trial because that would frustrate the Student Code completely.

8. Reaching A Decision - "More Likely Than Not"

Each of us has heard -- if only from watching movies and television -- that, in a criminal case, the defendant may be found not guilty unless his guilt is proved "beyond a shadow of a doubt", or some similar phrase. Of course, it is very difficult to be sure of anything "beyond a shadow of a doubt". Nevertheless, Americans use these standards in criminal law because we want to be very sure before someone is put in jail.

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[7] Buttny v. Smiley, 281 F.Supp. 280 (D.Colo. 1968).

This approach is not used under the Student Code. The Student Code is not a criminal code, nor does it attempt to be like one. Indeed, when the Code has been revised such "criminal law" approaches have been considered -- and rejected.

A Student Code hearing is, instead, strictly a civil matter of whether and what discipline should be imposed in order to make Duquesne University the best possible place for students to seek "A Liberal Education in the Catholic Tradition". Under our Code, the job of the judicial board in every case is to decide, based upon all the relevant evidence introduced at the hearing which a reasonable mind might accept as adequate to support a conclusion, whether -- more likely than not -- a Code violation has been committed.

Sometimes, this is a difficult job for a judicial board, especially because the "routine" case heard by a board presents a "serious" accusation. Always, it is a difficult experience not only for the accused student, but also for the person making the accusation and for the witnesses. There is no assumption that a person making a charge must prove the violation "beyond a doubt". Instead each board must determine whether, more likely than not, the violation was committed.

If a board feels that, more likely than not, the person making the charge was right -- that the accused did violate the Student Code, a judicial board should find that the Code was violated.

If, on the other hand, a board feels that it has not been proved to its satisfaction that the accused student did -- more likely than not -- violate the Code, a judicial board should find there was no violation.

Court decisions have confirmed that student codes, like Duquesne's, should not be considered similar to criminal matters. For example, the federal appellate court having jurisdiction over Pennsylvania has held that "codes of conduct prescribed for students by educational institutions are not required to satisfy the same rigorous standards in this regard as are criminal statutes... For student discipline is not analogous to criminal prosecution." Sill v. Pennsylvania State University, 462 F.2d 463, 467 (3rd Cir. 1972) (citations omitted).

Moreover, then-Judge but now Supreme Court Justice Blackmun stated much the same view in Esteban v. Central Missouri State College:

> [I]t is not sound to draw an analogy between student discipline and criminal procedure.... Certainly these [university] regulations are not to be compared with the criminal statute.... Let there be no misunderstanding as to our precise holding. We do not hold that any college regulation, however, loosely framed, is necessarily valid. We do not hold that a school has the authority to require a student to discard any constitutional right when he matriculates. We do hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct; that, as to these, flexibility and elbow room are to be preferred over specificity; that procedural due process must be afforded... by way of adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and with all necessary protective measures; that school regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure; and that the courts should interfere only where there is a clear case of constitutional infringement." 415 F.2d 1077, 1088-1090 (8th Cir. 1969) (emphasis added).

Clearly then, a Student Code proceeding is not a criminal matter. Rather, it is a civil procedure allowing for our community of scholars to help guarantee the existence of a good academic environment. One part of the Code's "rights and responsibilities", regrettably, however, is that boards must determine whether some members of the community violate the Code. When boards make these decisions, they do so on a "more likely than not" basis.

C. Opportunity to Appeal

Some courts have ruled that the right of appeal to the highest administrative official or board is an important procedural safeguard and is required by due process. Without the opportunity for appeal, the student's enjoyment of all other rights required by due process is dependent upon the good faith, competence, and wisdom of the tribunal with sole responsibility for the decision. In addition, the provision of a normal appeals channel makes it unnecessary and inappropriate for students to seek review by University officials outside of the Student Code framework. This helps to insure the integrity of the Student Code and to prevent intervention in the self government of our academic community by courts or government agencies.

An appeals procedure is set forth in Article I-E of the Student Code. It provides that one "appeal of a decision reached by the judicial body or of sanction(s) imposed by the judicial advisor may be made by an accused student to the Appellate Board." In practice, this has worked well.

There are several grounds an accused student may advance on appeal, and these are listed in the Student Code. The most common claim is under VI-E-b that a finding of a violation was not based upon sufficient evidence. This type of appeal is generally quite time consuming because appellate boards normally feel they must review all of the tapes to evaluate the claim properly. Thankfully, this review does not require the appellate board to determine if it would have reached the same conclusion or called other witnesses or asked other questions. It is not hearing the matter anew. Instead it determines only if the decision "was based on substantial evidence, i.e., were the facts in the case sufficient to establish guilt or innocence." In other words, an appeal under this hearing will be upheld only when the appellate board determines that the evidence at the hearing was not such that a reasonable mind could accept as adequate to support the judicial board's conclusion. Because this is a frequent type of appeal, it is important that every board explain the reasoning behind its conclusion so that its reasoning will be understood on appeal.

The Student Code also allows appeals by persons who normally would be appealing a finding of not guilty (Article VI-E-3). This procedure has not been used frequently but it does mean that even a finding of "not guilty" means that the case is not "over" until the five school day period for appeals has expired.

RELATIONSHIP TO OTHER CODES

In American criminal law, "due process" and "double jeopardy" protect a person from being tried twice for the same offense. If a student has been charged with violating both a criminal law and a provision of Duquesne's Student Code, due process does not protect the person from two independent proceedings. The courts have viewed university proceedings as taking place in a completely separate setting and as not being criminal in nature. Thus, they have held that there is no question of a due process violation.

Whenever it occurs that a student is charged with criminal violations and Student Code violations for the same conduct, it will be necessary to consider how best to protect the interest of the University and other students in a prompt hearing and the interest of a student to avoid the risk of self-incrimination. This occurs rarely but, when it has occurred, it has been resolved in a satisfactory way.

Where the student's conduct violates the Duquesne Student Code and an additional Code of Responsibility adopted by one of Duquesne's schools, the Duquesne Code provides for the resolution of any jurisdictional conflicts.

The only other subsidiary Code is the Law School Code. All Law School students are subject to the Student Code and the Student Code takes precedence. Article IX of the Student Code provides that all academic, professional and inter-personal matters will be deferred to the Law School

Code and that matters covered by only one code shall be resolved under that Code.

Importantly, the Student Code enumerates several areas which are in all instances to be governed by the Student Code:

--any incident involving fire, and all violations alleged under Article V, ¶B3, ¶B9 and/or ¶B11.
--any incident concerning residence halls.
--any incident involving at least one non-Law School student.
--any incident not handled promptly under the Law School Code.

In addition, the Student Code provides that any conflicts between the two codes that are not otherwise remedied shall be resolved according to the sound discretion of the Dean of Students. The Student Code further provides that sanctions previously imposed under the Law School Code may be considered in subsequent Student Code proceedings and vice-versa.

Finally, conduct may violate academic guidelines as well as the Student Code (or Law School Code). Good examples are plagiarism and cheating. Such offenses may lead to both academic sanctions and Code sanctions. In practice, sanctions imposed under one system may be considered in the other system but such offenses may lead to two different sanctions. Academic sanctions are reviewable under the University's policy on Fairness in Academic Evaluation and are not part of the Student Code system.

JURISDICTION OVER OFF-CAMPUS ACTIVITY

The Student Code's jurisdiction is clear when the prescribed activity takes place within the confines of the campus. University jurisdiction, however, extends off-campus in certain instances. Professor Wright has concluded that a school could discipline a student for off-campus activity as long as an interest of the university community is involved. The interest of the university is usually interpreted broadly. However, where there is no discernible damage to the interest of the university or where there is not a clear relationship between the off-campus activity and the damage to the university, it would be contrary to fundamental fairness to discipline the student. This distinction is contemplated by the Student Code. (See Article V-A and Article V-C-1.)

CONCLUSIONS

The requirements of due process vary and are flexible. Accordingly, the safeguards here discussed need not be afforded in every instance. Where there is an overriding reason for denying any of these safeguards, the decision of the judicial body to do so will be respected. If the judicial body carefully weighs the interests involved prior to disposing of any of these safeguards, it is unlikely that the decision will be challenged successfully on the grounds of due process.

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REGULATION OF STUDENT CONDUCT: BAD ACTS ON/OFF CAMPUS

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I. Interaction of Codes of Conduct with Outside Law

A. Civil and Criminal Contexts

While there are various civil law applications, e.g., zoning, curfew, smoking, alcohol, and hazing [see, Application of Zoning Regulations to College Fraternities or Sororities, 25 ALR 3d 921 (1969); Social Host Liquor Liability, 92 Dickinson L. R. 665 (1988); Dram Shop Laws and Tort Liability, 14 J.C.U.L. 399 (1987); Note, Hazing and the 'Rush' Toward Reform: Responses from Universities, Fraternities, State Legislatures, and the Courts, 16 J.C.U.L. 93 (1989)] the focus of this outline is on-campus and off-campus student conduct that constitutes a violation of a student code of conduct and of criminal law.

B. Authority to Regulate Student Conduct On/Off Campus

1. Jurisdiction over Off-Campus Conduct

a. General. Courts have consistently upheld the authority of universities to discipline students for off-campus conduct provided that there is a demonstrable nexus between the regulated off-campus conduct and the interests of the university. Weeks & Staley, Student Discipline and Off-Campus Misconduct, 13 Lex Collegii 4 (Spring 1990); Annotation, Misconduct of College or University Student Off Campus as Grounds for Expulsion, Suspension, or Other Disciplinary Action, 28 ALR 4th 463 (1984); Swem, Due Process Rights in Student Disciplinary Matters, 14 J.C.U.L. 359, and cases cited in note 33 at 365; General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education (U.S.Dist.Ct. W.D. Missouri) 45 F.R.D. 133, 145 (1968).

b. Policy consideration. Asserting jurisdiction over student off-campus conduct as increasing exposure to institutional liability for such conduct.

2. Public - Private Status Factors

a. Due Process Constraints on Disciplinary Process as it Relates to Outside Law - Public Institutions

(1) General. Public institution students facing significant disciplinary action are entitled to constitutional due process protections. See, Wright, The Constitution on Campus, 22 Vand. L. Rev. 1027 (1969); Note, University Disciplinary Process: What's Fair, What's Due, and What You Don't Get, 96 Yale L. J. 2132 (1987); Richmond, Students' Right to Counsel in University Disciplinary Proceedings, 15 J.C.U.L. 289 (1989); Swem, Due Process Rights in Student Disciplinary Matters, 14 J.C.U.L. 359 (1987); Dixon v. Alabama State Board of Education, 294 F2d 150 (5th Cir. 1961), cert. denied, 368 US 930 (1961); Esteban v. Central Missouri State College, 277 F.Supp. 649 (W.D.MO 1967). Full constitutional strictures would apply if students at public institutions were found to have a property interest ["legitimate claim of entitlement to a benefit, not just a need, desire or unilateral expectation of it", Board of Regents v. Roth, 408 US 564 (1972)] or liberty interest ["where a person's good name, reputation, honor or integrity is at stake because of what the government is doing", Wisconsin v. Constantineau, 400 US 433, 437 (1971)] in their educations, but the Supreme Court has preferred to decide cases more narrowly on grounds that there was no showing of violation of arbitrary and capricious due process standard, even if it applied. Regents of University of Michigan v. Ewing, 106 S.Ct. 507 (1985); Board of Curators of University of Missouri v. Horowitz, 435 US 78 (1978).

(2) Right to Counsel and Privilege Against Self-Incrimination

(a) General Rule. Not included in Dixon due process criteria, or required where penalty is "short suspension" (less that ten days), Goss v. Lopez, 419 US 565 (1975). Student is entitled to counsel where university is proceeding through counsel, or the student faces criminal charges arising out of the same facts that led to university disciplinary action. Role of counsel only to advise student, not to participate in hearing or to cross-examine witnesses. "Full dress judicial hearing" not required under Dixon standard. Gabrilowitz v. Newman, 582 F2d 100 (1st Cir. 1978); McLaughlin v. Massachusetts Maritime Academy, 564 F.Supp. 809 (D Mass 1983); Hart v. Ferris State College, 557 F.Supp.1379 (WD Mich 1983).

(b) If a right to counsel, must student be so informed by the university? Probably so, under the balancing test of Matthews v. Eldridge, 424 US 319, 335 (1976) as applied in Hart v. Ferris

State College, 557 F.Supp. 1379,1387-88 (WD Mich 1983) since the administrative and financial burden of so informing the student is light. But, if student cannot afford counsel, university is *not* required to provide one. *French* v. *Bashful*, 303 F.Supp. 1333,1338 (E.D.La 1969).

b. Due Process Constraints on Disciplinary Process as it Relates to Outside Law - Private Institutions Distinguished

(1) General rule. Private institutions are not bound by constitutional guarantees of due process unless the imposition of sanctions by private university can be shown to be "state action". Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 J. Law & Educ 171 (1982; Silets, *Of Students' Rights and Honor: The Application of the Fourteenth Amendment Due Process Strictures to Honor Code Proceedings at Private Colleges and Universities*, 64 Denver L. Rev. 47 (1987). Traditional state action "government contacts" and "public function" theories have been narrowed. *Randall-Baker* v. *Kohn*, 457 US 830 (1982); *Lugar* v. *Edmonson Oil Co.*, 457 US 922 (1982).

(2) State Action Applications in Interaction with Outside Law. *Albert* v. *Caravano*, 824 F2d 1333 (2nd Cir. 1987) applied the *Lugar* test to find state action and due process violations in Hamilton College's suspension of students under regulations for maintenance of public order, adoption of which regulations was required by the state. This suggests that due process rights including counsel are required when hazing policy violations are also criminal violations. *Stone* v. *Dartmouth College*, 682 F.Supp. 106 (D.NH 1988).

(3) Generally, courts will protect private school students from clearly arbitrary disciplinary actions if the institution has no reasonable rule, or if it fails to follow its rules. Generally private institutions are still not subject to same specificity of standards as public institutions, but "fundamental fairness" is required, and it may be more costly to contest student due process rights than to accord them.

3. Theories of University-Student Relationship

a. General. Fowler, *The Legal Relationship Between the American College Student and the College: An Historical Perspective and the Renewal of a Proposal*, 13 J. Law & Educ. 401 (1984), in which the author presents interesting account of college as corporation, parent (in loco parentis), government (due process), vendor (caveat emptor), expert (hands off), and fiduciary (benefit of student).

b. In Loco Parentis Gott v. Berea College, 161 S.W. 204 (KY 1913) is classic judicial pronouncement. Erosion of doctrine in 1960's and 1970's. Bradshaw v. Reynolds, 612 F2d 135 (3rd Cir. 1979), cert. denied, 446 US 909 (1980). Some have argued recent re-emergence of the doctrine, Zirkle & Reichman, Is the In Loco Parentis Doctrine Dead?, 15 J. Law & Educ. 271 (1986); Szablewicz & Gibbs, Colleges' Increasing Exposure to Liability: The New In Loco Parentis, 15 J. Law & Educ. 453 (1987); others argue it has not returned, Richmond, Students' Right to Counsel in University Disciplinary Proceedings, 15 J.C.U.L. 289 (1989).

c. Contract. This frequently cited theory is especially prevalent when university is private. Zumbrun v. University of So. California, 101 Cal.Rptr. 499 (1972). See, generally, Nordin, The Contract to Educate: Toward a More Workable Theory of the Student-University Realtionship, 8 J.C.U.L. 141 (1981-82); but see, also, Dodd, The Non-Contractual Nature of the Student-University Contractual Relationship, 33 U. Kansas L. Rev. 701 (1985).

e. Other. The fiduciary, "rights", and "special" relationships theories. Richmond at 292; Fowler at 414. See cases cited in section II, B, (3), infra.

C. Campus Discipline and Criminal Prosecution for Same Student Misconduct.

1. General. Weeks & Staley, Student Discipline and Off-Campus Misconduct, 13 Lex Collegii 4 (Spring 1990). For a lively statement of the student perspective, see generally, Picozzi, University Disciplinary Process: What's Fair, What's Due, and What You Don't Get, 96 Yale L.J. 2132 (1987), the author of which was a former defendant in a student disciplinary case. Picozzi v. Sandalow, 623 F. Supp.1571 (ED Mich 1986).

2. Timing of Process: Legal Considerations

a. General. Dual proceedings are not double jeopardy, which only prohibits successive criminal prosecutions for same offense. Not necessarily a violation of privilege against self-incrimination (Grossner v. Trustees of Columbia University, 287 F.Supp. 535 (S.D. NY 1968); Furutani v. Ewigleben, 297 F.Supp. 1163 (N.D.Cal. 1969). Government may not penalize a person for exercising privilege against self-incrimination. Garrity v. New Jersey, 385 US 493 (1967); Lefkowitz v. Turley, 414 US 70 (1973), but few institutions permit student defendants to remain silent in disciplinary hearing without a negative inference being drawn. Golden, Procedural Due Process for Students of Public colleges and Universities, 11 J. Law & Educ 337 (1982). If a student voluntarily decides to testify in university hearing, the student waives the right against self-incrimination and the testimony is admissable in a criminal prosecution. Moran v. Burbine, 106 S.Ct. 1135 (1986) (waiver is valid if suspect's decision not to rely on his rights was uncoerced, if he knows he could remain silent and request an attorney, and if aware of state's intention to use his statements to secure conviction). Rogers v. US, 340 US 367 (1951) (once incriminating facts have been voluntarily revealed, privilege against self-incrimination cannot be invoked to avoid further disclosure).

b. The courts have consistently held that universities may proceed with such hearings in advance of criminal trials. University is not required to defer to criminal courts by postponing or cancelling hearing. Courts have approved a number of options to be legally and constitutionally permissible:

(1) Campus Discipline Prior to Criminal Charges

(2) Campus Discipline After Charge, Prior to Trial

(3) Campus Discipline Concurrent with Criminal Proceeding

(4) Campus Discipline After Criminal Process Concluded

Wimmer v. Lehman, 705 F2d 1402 (4th Cir. 1983); Nzuve v. Castleton State College, 335 A.2d 321 (1975). Gabrilowitz v. Newman, 582 F2d 100 (1st Cir. 1978); McLaughlin v. Massachusetts Maritime Academy, 564 F.Supp. 809 (D.Mass. 1983); Hart v. Ferris State College, 557 F.Supp. 1379 (1983).

3. Timing of Process: Parties' Interests and Policy Considerations

a. Student interests.

(1) Before criminal charge is filed, student decision whether to defend at campus hearing and risk contributing to likelihood of charge;

(2) When criminal proceeding pending, student can defend at campus hearing with potential self-incrimination and revealing strength of case to prosecutor, or risk university discipline without defending;

(3) After an acquital, there is low risk from campus hearing since double jeopardy protects student from a second prosecution based on evidence from campus hearing;

(4) After a conviction, little risk of damage from erroneous findings in campus hearing since heavier burden

of proof in criminal proceeding;

(5) If applicable, victimized student options for proceeding on campus for prompt resolution, and such student's expectations of university.

See, generally, Picozzi, University Disciplinary Process: What's Fair, What's Due, and What You Don't Get, 96 Yale L.J. 2132 (1987).

b. University Interests.

(1) Demonstrate that it takes seriously the alleged misconduct;

(2) Avoid students' losing respect for code due to lengthy delays of criminal process;

(3) Reserve administrative authority and flexibility to be proactive;

(4) Avoid trivialization of code dealing only with minor misconduct;

(5) On other hand, perhaps could save time and money by having simple policy postponing campus hearing until resolution of related criminal proceedings;

(6) Institutional responsiveness to concerns of victimized students;

(7) Institutional responsiveness to public policy and social trends.

See, generally, Stoner and Cerminara, Harnessing the 'Spirit of Insubordination': A Model Student Disciplinary Code, Journal of College and University Law, Fall 1990; Swem, Due Process Rights in Student Disciplinary Matters, 14 J.C.U.L. 359, 379 (1987); Richmond, Students' Right to Counsel in University Disciplinary Proceedings, 15 J.C.U.L. 289, 311-12 (1989)

4. Statutory Intersections

The Drug Free Schools and Communities Act of 1989 provides that in order to be eligible to receive federal funding institutions of higher education must have a drug and alcohol abuse prevention program that includes, at a minimum:

a. Annual distribution in writing to each employee and to each student:

(1) standards of conduct that clearly prohibit the unlawful possession, use, distribution of illicit drugs and alcohol by students and employees on an institution's property or as part of any of its activities;

(2) description of applicable legal sanctions under local, state, or federal law for the unlawful possession, use, or distribution of illicit drugs and alcohol;

(3) description of health risks associated with the use of illicit drugs and alcohol;

(4) description of any drug or alcohol counseling, treatment, rehabilitation, or re-entry programs that are available to employees or students; and

(5) a clear statement that the institution will impose disciplinary sanctions on students and employees and a description of those sanctions, up to an including expulsion or termination of employment and referral for prosecution for violation of the standards of conduct outlined in item (1). A disciplinary sanction may include the completion of an appropriate rehabilitation program;

b. Biennial review of the program by each institution to:

(1) determine the program's effectiveness, and to implement changes where necessary; and

(2) ensure that the required disciplinary sanctions are being enforced consistently.

D. Campus Security Guards in the Interaction with Outside Law

1. Public - Private Status Factors

a. State law may grant full arrest powers to campus security guards of public universities, or public universities and private universities may have security guards who are deputized by a county sheriff, commissioned by a city, or commissioned by both a city and a county, or rely on citizens arrest powers when necessary. Kaplin, The Law of Higher Education, at 365-67. Jurisdiction may extend to off-campus as well as on-campus activity, though off-campus authority may be more limited. State v. Lyon, 584 P2d 844 (4th Cir. 1978)

b. Public university security guards subject to full constitutional standards regarding arrest, search and seizure. Private university security guards may also be subject to constitutional standards where a search, seizure or arrest is "in aid of law enforcement authorities" or "for transfer to custody of the state". People v. Zelinski, 594 P2d 1000 (1979).

2. Tort Liability. There may also be institutional tort liability for security guard activities "if they are undertaken without justification or accomplished carelessly". Kaplin, *The Law of Higher Education* at 367. *Jones* v. *Wittenberg University*, 534 F2d 1203 (6th Cir. 1976).

3. Law Enforcement and the Student-University Relationship

a. General. For interesting analysis of relationship of trends in societal and judicial expectations for criminal law enforcement on campus to trends in judicial recognition of theoretical foundation of the student-university relationship, particularly the status of the *in loco parentis* doctrine, see Berman, *Law and Order on Campus: An Analysis of the Role and Problems of the Security Police*, 49 J. of Urban Law 513 (1971).

b. Student-University Interests in "Cooperation". *Picozzi* at 2153-54 notes that extent of coordination of university and law enforcement efforts is an "ominous variable, impossible for the student to know", noting "It is common for local non-university police to keep academic officials apprised of developments in criminal investigations, for the police to make their files available to universities, and for police officers to make themselves available to testify at university disciplinary hearings. (*Wimmer* v. *Lehman*, 705 F2d 1402 (4th Cir. 1983); *Gabrilowitz* v. *Newman*, 582 F2d 100 (1st Cir. 1978); *Picozzi* v. *Sandalow*, 623 F.Supp. 1571 (E.D.Mich 1986); *Hart* v. *Ferris State College*, 557 F.Supp. 1379 (W.D.Mich 1983)".

c. Arrangements of campus security and outside police should take into account university size, location, record of prior incidents, capability of local police agencies, and quality of relations in this area.

II. "Undesirable Guest" Relations: Access to Campus

A. Tension between Access and Security

This relatively new and increasingly important issue involving practical and legal problems in planning and implementing campus security requires careful attention by administrators and legal counsel.

1. Constitutional and Policy Factors for Access

a. See, Annotation, *Validity and Construction of State or Ordinance Forbidding Unauthorized Persons to Enter Upon or Remain in School Building or Premises*, 50 ALR 3d 340. Generally, trespass and loitering statues, including those with special reference to school premises, have been upheld against constitutional attacks of vagueness, overbreadth, due process and equal protection, and First Amendment freedoms where they apply only to unlawful presence or lack of legitimate business on premises. Princeton v. Schmid, 455 US 100 (1981) (right of access of nonstudents on private institutions); Fox v. Board of Trustees of SUNY, 649 F.Supp 1393 (1986), rev'd 841 F 2d 1207 (2d Cir. 1988), rev'd and remanded, Board of Trustees of SUNY v. Fox, 106 L.Ed. 2d 388, ___ US ___ (1989) (public institutional policies regulating facilities access).

b. Injunctive relief against a continuing trespass has some advantages over criminal prosecution for various campus confrontations (Rosenthal, Injunctive Relief Against Campus Disorders, 118 U. Pa. L. Rev. 746 (1970), but is largely ineffective against situations involving intruders and unknown assailants.

c. The tradition of openness, access, free movement stemming from the notion of the academy is being tested.

2. What is the University's "Responsibility"?

a. Public policy and social trends point to a new set of expectations by students, parents, legislatures, courts and society. This is a relatively new development, with virtually all important cases in the area occurring in the 1980's. The future will be more demanding of universities - to limit their liability, universities must take this challenge seriously.

b. See, generally, Annotation, Liability of University, College, or Other School for Failure to Protect Student from Crime, 1 ALR 4th 1099 and supplement 1 ALR 4th 1099-1104. Note, The Liability and Responsibility of Institutions of Higher Education for the On-Campus Victimization of Students, 16 J.C.U.L. 119 (1989).

B. Theories of Third Party Defendant Liability for Criminal Victimization

1. This presentation focuses on college or university liability, principally tort liability, that is not barred by sovereign (public) or charitable (private) immunity. See, generally, Annotation, Modern Status of Doctrine of Sovereign Immunity as Applied to Public Schools and Institutions of Higher Learning, 33 ALR 3d 703; Annotation, Immunity of Private Schools and Institutions of Higher Learning from Liability in Tort, 38 ALR 3d 480.

2. Principal theoretical approaches

- **a. Negligence**
- **b. Contract**
- **c. Fraudulent Misrepresentation**

3. Negligence

a. Elements of Cause of Action in Tort

(1) Duty
    (a) Relationship
    (b) Foreseeability
(2) Breach of Duty
(3) Proximate, Legal Cause of Injury

b. Duty stemming from special relationship

(1) Restatement, Second, Torts (1965), section 315

"There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection."

(2) Brown v. North Carolina Wesleyan College, 309 SE 2d 701 (1983); Graham v. Montana State University, 767 P2d 301 (1988); Nieswand v. Cornell University, 692 F.Supp. 1464 (1988).

c. Duty stemming from status as landowner or landlord

(1) Restatement, Second, Torts, section 344

"A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by filure of the possessor to exercise reasonable care to: (i) discover that such acts are being done or are likely to be done; or (ii) give a warning adequate to enable the visotirs to avoid the harm, or otherwise protect themselves against them."

"Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character ot his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection." (emphasis added (Comment (f) to section 344).

(2) Duties as to invitee, licensee, trespasser

(a) As to an invitee, "a person invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public or a business visitor for a purpose connected with business dealings of the possessor" (Restatement, Second, Torts, section 332), the duty is to maintain reasonably safe premises, to ascertain dangerous conditions, and to warn of those conditions (Restatement, Second, Torts, section 343);

(b) As to a licensee, "a person who is privileged to enter or remain on land only by virtue of the possessor's consent" (Restatement, Second, Torts, section 330), the duty is to disclose dangerous conditions known to the possessor but not likely to be discovered by the licensee (Restatement, Second, Torts, section 342);

(c) As to a trespasser, "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise" (Restatement, Second, Torts, section 329), there is no duty except to make reasonable efforts to warn about highly dangerous conditions or activities (Restatement, Second, Torts, section 333).

(3) Peterson v. San Fransisco Community College, 685 P2d 1193 (1984); Miller v. State of New York, 467 NE 2d 493 (1984); Thompson v. Kent State University, 521 NE2d 526 (1987); Duarte v. State, 151 Cal.Rptr.727 (1979); Rabel v. Illinois Wesleyan University, 514 NE2d 552 (1987); Baldwin v. Zoradi, 176 Cal.Rptr. 809 (1981).

d. Duty Voluntarily Assumed

(1) Restatement, Second, Torts, section 323

"One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking."

(2) Figueroa et al v. Evangelical Covenant Church d/b/a North Park College, 879 F2d 1427 (1989); Cutler v. Board of Regents of State of Florida, 459 So2d 413 (1984); Mullins v. Pine Manor College, 449 NE2d 331 (1983).

(3) The important distinction between "nonfeasance" (inaction or failure to take steps to prevent others from harm) and "misfeasance" (active misconduct working positive injury to others) is discussed in Note, Tort Liability of Colleges and Universities for Injuries Resulting From Student Alcohol Consumption, 14 J.C.U.L. 399, 403 (1987) See, Baldwin v. Zoradi, 176 Cal.Rptr. 809 (1981) and Beach v. University of Utah, 726 P2d 413 (1986).

e. Reasonable Foreseeability

(1) Public Policy and Social Trend Factors

Bernard, "The Criminal Intruder on Campus: A New Era of Foreseeability", Am I Liable? Faculty, Staff and Institutional Liability in the College and University Setting (NACUA, 1989); Szablewicz & Gibbs, Colleges' Increasing Exposure to Liability: The New In Loco Parentis, 16 J. Law & Educ. 453 (1987)

(2) School Board of Palm Beach County v. Anderson, 411 So 2d 940 (1982); Jesik v. Maricopa County Community College, 611 P 2d 547 (1980); Brown v. North Carolina Wesleyan College, 309 SE 2d 701 (NC App. 1983); Bearman v. University of Notre Dame, 453 NE 2d 1196 (1983).

(3) "Relative Foreseeability". Mullins v. Pine Manor College, 449 NE 2d 331 (1983) court found foreseeability without existence of prior criminal acts: the college voluntarily assumed to provide security, testimony established the college had in fact foreseen the harm, students detrimentally relied on college. Bernard, cited in paragraph (1) above, finds this "relative foreseeability" analysis also present in Miller v. New York and Peterson v. San Fransisco Community College District.

(4) Relyea v. State, 385 So 2d 1378 (1980), presents a good case for comparison, where no elements of duty were present, and foreseeability not established.

C. Dealing with Tensions of Access and Security

1. Time, Place and Manner Restrictions

2. Use of Police to Enforce Trespass and Loitering Laws

3. Developing Campus Security Policies

Responding to Campus Crime: A Guide for Administrators, United Educators Insurance Risk Retention Group Inc (Chevy Chase, MD, March 1990) is a helpful monograph to assist administrators in preparing a management plan for reacting to serious crime on campus including identifying risks, coordination of efforts, and role of warnings.

D. Federal Campus Crime Awareness and Campus Security Act of 1990

Reflective of public policy and social trends, this new Federal statute will have a significant impact on the interaction of campus codes of conduct and outside law, and on the university's living with the tension of access and security, including its liability for criminal victimization of students by "unwelcome guests". The law requires colleges and universities to distribute to its students and employees on an annual basis, and to applicants for admission and employment, (i) certain statistics on specified crimes, and (ii) descriptions of university policies concerning campus security, including:

1. statement of policies regarding procedures for reporting criminal actions and the institution's response to such reports;

2. statement of policies concerning access to campus facilities;

3. statement of policies concerning campus law enforcement, including a description of the enforcement authority of campus security and their working relationship with state and local police, and a description of policies which encourage accurate and prompt reporting of all crimes to police;

4. statement of policies concerning the monitoring of criminal activity at off-campus student organizations through local police agencies; and

5. statement of policies regarding alcohol and drugs and a description of any drug or alcohol abuse education program.

DISCIPLINING THE STUDENT

October 3, 1992
NACUA/NASPA Program
Portland, Oregon

DAVID R. SCOTT
Rutgers, The State University
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For this session, Elsa Kircher Cole, the General Counsel of the University of Michigan, has submitted a comprehensive written overview of the legal requirements for "disciplining the student" in public and private institutions. These requirements necessarily focus on such overriding legal issues as whether "due process" applies; if so, what process is due; whether institutions have "breached" their own internal disciplinary rules, etc. Russell DeRemer, the Dean of Students, Whitman College, and the session's third speaker, will focus on disciplining the student from an administrator's point of view. As one can see from his outline, Dean DeRemer will be looking at the practical problems and solutions to recurring disciplinary issues. In turn, this outline covers some legal issues involved in three specific areas connected with disciplining the student -- acquaintance rape, the dual jurisdiction of internal proceedings and outside criminal cases, and campus disruptions.

I. Some Acquaintance Rape Legal Issues in Disciplinary Proceedings

A. A pervasive problem. Acquaintance rape is perhaps the most explosive and difficult student discipline issue on public and private campuses today. For example, as summarized in an article in the January 1992 edition of the Journal of American College Health[1], a Ms Magazine Project on Campus Sexual Assault, led by Mary Koss, distributed a questionnaire to a sample of 6,159 college students (3,187 female, 2,972 male) enrolled at 32 institutions in the United States. The results of that questionnaire have produced the most often cited figures concerning acquaintance rape on campus. (Whether the figures are accurate or not is a different question.)

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[1] "Acquaintance Rape on Campus: A Literature Review" by Dennis Benson, Cathy Charlton and Fern Goodhart, Journal of American College Health (January 1992).

Responses to the questionnaire indicated that:

- over 50% of the women surveyed were victims of some form of sexual abuse;

- over one in four college age women had been the victim of rape or of attempted rape;

- 84% of the victims knew their assailants;

- 57% of the assaults occurred on dates;

- 41% of women raped were virgins at the time of the assault;

- 73% of the assailants and 55% of the victims had used alcohol or drugs prior to the assault;

- 42% of the victims told no one;

- only 27% of the women who described themselves as victims of what legally met the definition of rape labeled what had occurred rape;

- 42% of victims indicated having sex with the offender again (unknown whether voluntarily or not);

- 25.1% of the men responding admitted to some degree of sexually aggressive behavior.[2]

While the debate rages whether acquaintance rape occurs on campus more often now than in the past or is merely more reported to authorities (or both), the unquestioned result is that this type of case is reaching internal disciplinary hearings and the courts more than ever before.

The following quotation comes from a 1992 New Jersey State Court civil case where the trial judge openly agonized about the "tremendous problem" of acquaintance rape on campus:

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[2] The Benson, Charlton, Goodhart article cites for these figures: Koss, M.P. "Hidden Rape: Sexual Aggression and Victimization in a National Sample in Higher Education" in Burgess, A.W. Rape and Sexual Assault II. New York, Garland Publishing, 1988, pp 3-25; and, Koss, M. P. and Gidycz, C. A. "Sexual Experiences Survey: Reliability and Validity." Journal of Consulting and Clinical Psychology. 1985; 53(3): 422-423.

"The court recognizes that date rape, and I say the court, I am just off the period of sending three girls through college, and the court certainly recognizes that date rape is a tremendous problem which is occurring probably on every campus in this country. I might say for the record that none of my three daughters attended at any time either undergraduate or graduate schools of Rutgers University. They attended private schools and they attended state schools and they attended church affiliated schools. The problem existed in all three types of schools.

"And so the court recognizes that it is a terrible problem that as a parent certainly I was concerned with, and one that we all should be concerned with. The court recognizes, too, and has to recognize that you probably can cut down the amount of date rape by ninety-five percent if you went back to the old rules that we had when I went to college where the female wasn't allowed in the male dorm and the male wasn't allowed in the female dorm, and God help us all if the two ever met anywhere. But I don't think anybody is suggesting that at all.

"We live in a very different world. Certainly that would be the way of controlling the situation. I don't think counsel for the plaintiff is suggesting that Rutgers should do that. Various other ways that you could probably eliminate it is by having boys on one floor and maybe girls on the next floor, et cetera, et cetera. But, as I understand it, that is no longer the system, not only in Rutgers, but anywhere else.

"There apparently is free visiting rights by both sexes in dorm rooms with people in other rooms. I don't think it is up to this court or any other court to turn the clock back on that, even though I might prefer the old fashion way. But that would be a solution.

> "Common sense will tell you that if you put young, healthy males and females in a room with or without alcohol and there are beds there, that ultimately there is going to be some sex. And what a university can do to prevent that, I don't know. And nobody has really suggested what they can do." Christine Coverdale v. Rutgers University, et al. Superior Court of New Jersey, Chancery Division, Middlesex County, No. C-12175-89. (Pp. 5-7 of unpublished opinion granting Rutgers' motion for summary judgment dated January 10, 1992.) (Emphasis added.)

B. The definition itself of acquaintance rape presents legal problems. Disciplining the student for "acquaintance rape" or "unwelcome sexual contact" or "sexual assault" or whatever similar term is actually used in the college or university disciplinary code presents a number of definitional issues. Two of the most recurring ones are:

1. Is the college or university's use of the term "acquaintance rape" (to use that term as the example) in its disciplinary code synonymous with the term's definition in the criminal laws of that particular state?

   Note that the terms do not have to be synonymous, but, if they are different, due process considerations require explicit notice to students of this difference in public institutions and fundamental fairness considerations may require similar notice in expulsion proceedings in private institutions.

   For example, at Rutgers, a state university, a student may be expelled under the disciplinary code for "the use of force" or "the threat of the use of force" against another student. These terms include but are not limited to such offenses as ". . . non-consensual sexual contact such as the non-consensual touching of a person's sexual organs or the touching of a person with another's sexual organs . . . ."

   Thus, the Rutgers disciplinary code terms for "rape" are purposely broader than the criminal definition of "rape" in New Jersey. That crime which is no longer called rape in New Jersey, but rather "sexual assault" is defined in part as follows:

> "c. An actor is guilty of sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances:
>
> > "(1) The actor uses physical force or coercion, but the victim does not sustain severe personal injury;
> >
> > "(2) The victim is one whom the actor knew or should have known was physically helpless, mentally defective or mentally incapacitated;
> >
> > ". . . . ;
> >
> > "(4) The victim is at least 16 but less than 18 years old and:
> >
> > > ". . . . ;
> > >
> > > "(b) the actor has supervisory or disciplinary power over the victim; . . . ."
>
> NJSA 2C:14-2c (Emphasis added.)

Query: under the above definitions, if a female victim is very drunk and seemingly acquiesces, is the male still guilty of sexual assault because she is "physically helpless" due to her drunkenness?

2. What constitutes the defense of consent to negate a sexual assault?

In student disciplinary cases involving "acquaintance rape" or sexual assault, the defendant male student often admits that sexual intercourse took place but counters that it was totally consensual, and therefore no punishable offense occurred. To establish this defense of consent, what must the defendant establish -- that no force or coercion was used? that the victim's state of mind was to offer no resistance? that passive permission was given? None of the above may now be sufficient to establish the defense of consent to the evolving offense of sexual assault.

In a case that received national attention this past summer, the New Jersey Supreme Court examined the issue of "acquaintance rape" involving a 17-year-old boy and a 15-year-old girl who were temporarily living in the same house and knew each other. The two unrelated juveniles had engaged in consensual petting and kissing one night whereupon the girl had fallen asleep in her bed. She testified that when she awoke, she found the boy on top of her, engaging in sexual intercourse and "told him to get off." The boy acknowledged having sex with her, and stated that he stopped as soon as she told him to. In reversing an intermediate appellate court's decision and reinstating the finding of juvenile delinquency for sexual assault against the boy, the Supreme Court of New Jersey found that, under these circumstances, the boy had to establish more than he stopped when she said "no." Rather, he had to establish that she said "yes" to sexual intercourse or exhibited actions that were the equivalent of "yes."

> "We emphasize as well that what is now referred to as 'acquaintance rape' is not a new phenomenon. Nor was it a 'futuristic' concept in 1978 when the sexual assault law was enacted. Current concern over the prevalence of forced sexual intercourse between persons who know one another reflects both greater awareness of the extent of such behavior and a growing appreciation of its gravity. Notwithstanding the stereotype of rape as a violent attack by a stranger, the vast majority of sexual assaults are perpetrated by someone known to the victim. Acquaintance Rape, *supra*, at 10. One respected study indicates that more than half of all rapes are committed by male relatives, current or former husbands, boyfriends or lovers. Diana Russell, The Prevalence and Incidence of Forcible Rape and Attempted Rape of Females, 7 Victimology 81 (1982). Similarly, contrary to common myths, perpetrators generally do not use guns or knives and victims generally do not suffer external bruises or

cuts. Acquaintance Rape, *supra*, at 10. Although this more realistic and accurate view of rape only recently has achieved widespread public circulation, it was a central concern of the proponents of reform in the 1970s." [Citation omitted.]

"The insight into rape as an assaultive crime is consistent with our evolving understanding of the wrong inherent in forced sexual intimacy. It is one that was appreciated by the Legislature when it reformed the rape laws, reflecting an emerging awareness that the definition of rape should correspond fully with the experiences and perspectives of rape victims. Although reformers focused primarily on the problems associated with convicting defendants accused of violent rape, the recognition that forced sexual intercourse often takes place between persons who know each other and often involves little or no violence comports with the understanding of the sexual assault law that was embraced by the Legislature. Any other interpretation of the law, particularly one that defined force in relation to the resistance or protest of the victim, would directly undermine the goals sought to be achieved by its reform." State of New Jersey in the Interest of M.T.S., 129 NJ 422, 609 A2d 1266, 1278 (1992).

* * *

"In these cases neither the alleged victim's subjective state of mind nor the reasonableness of the alleged victim's actions can be deemed relevant to the offense. The alleged victim may be questioned about what he or she did or said only to determine whether the defendant was reasonable in believing that

> affirmative permission had been freely given. To repeat, the law places no burden on the alleged victim to have expressed non-consent or to have denied permission, and no inquiry is made into what he or she thought or desired or why he or she did not resist or protest." Id. at 1279.

* * *

> "Because 'physical force' as an element of sexual assault in this context requires the absence of affirmative and freely-given permission, the 'consent' would require the presence of such affirmative and freely-given permission. Any lesser form of consent would render the sexual penetration unlawful and cannot constitute a defense." Id. at 1279.

* * *

> "Under the reformed statute [of sexual assault], a person's failure to protest or resist cannot be considered or used as justification for bodily invasion.
>
> "We acknowledge that cases such as this are inherently fact sensitive and depend on the reasoned judgment and common sense of judges and juries." Id. at 1279.

Needless to say, the same reasoned judgment and common sense of college administrators and fact-finders in disciplinary cases will be necessary to decide whether a particular sexual encounter should be prosecuted or not due to the absence or presence of consent. The evolution of the criminal law in one's particular state cannot help but have a powerful influence on what kind of sexual assaults are considered disciplinary offenses within the walls of the college or university.

C. Opportunity to report alleged acquaintance rape to outside authorities as well as to college officials.

If an alleged acquaintance rape is reported first to college administrators or campus police, it is critical that the victim be informed of the right to complain to the local prosecutor's office as well. If student disciplinary charges are to be brought after an internal investigation, then the college or university may be later charged with a "cover-up" by the victim if the local prosecutor is not contacted and an internal disciplinary hearing results in a "not guilty" finding. See, *e.g.*, Christine Coverdale v. Rutgers University, et al., *supra*, where the victim civilly sued the University and three University officials alleging, inter alia, that the student disciplinary panel convened to hear her charge of being "date raped" was a sham and part of a plot to keep her from complaining to the county prosecutor. (The Court found that the facts did not support Ms. Coverdale's allegations against the University and its officials and dismissed them from the case.)

D. Is there sufficient evidence to charge a student with acquaintance rape?

Stated succinctly, a typical college or university investigation into the facts surrounding an allegation of acquaintance rape is likely to discover two things -- (1) there are no witnesses other than the alleged victim and the alleged rapist and (2) concomitantly, the only real evidence is her word against his.

These so-called "one-against-one" cases should not be dropped by the college merely because the two principals' versions contradict each other and there is no physical evidence. For example, the credible evidence may not be equally balanced at all. Her version even though unsupported by other witnesses may contain so much more of "the ring of truth" than his that the case cries out for prosecution by the university. Similarly, the burden of proof in student disciplinary hearings is usually lower than the criminal standard of beyond a reasonable doubt. Rather the standard is usually by a "preponderance of the credible evidence" or by "clear and convincing proof," etc. Consequently, college authorities have the opportunity to prevail in difficult sexual assault cases much more than prosecutors do in criminal courts. This, of course, puts an even heavier burden on the college officials to investigate thoroughly before charging a particular student with a sexual offense in violation of a disciplinary code.

E. Right to counsel for the victim.

As acquaintance rape charges become more prevalent in student disciplinary hearings, it becomes more and more necessary for the college officials to explain that the prosecuting dean or attorney representing the university does not represent the individual interests of the victim. Great confusion and problems may result if the victim is not told precisely how a student disciplinary proceeding works and that she has a right to be advised by her own attorney if she does not feel adequately protected by the administrator or attorney presenting the university's case. Particularly in negotiated settlements or plea agreements with the college authorities, the interests of the victim and the university may diverge.

F. The requirements of the Federal Higher Education Amendments of 1992.

Section 486(c)(B)(iv) of the Higher Education Amendments of 1992, Public Law 102-325, requires colleges and universities that participate in

> ". . . any one of a large number of federal student aid programs to have in their procedures for on-campus disciplinary actions in cases of alleged sexual assault a 'clear statement' that:
>
>> "a. The accuser and the accused are entitled to the same opportunities to have others present during a campus disciplinary proceeding; and
>>
>> "b. Both the accuser and the accused shall be informed of the outcome of any campus disciplinary proceeding brought alleging a sexual assault."
>
> (The quote is from Elsa Cole's accompanying outline for this Session at p.8.)

II. Some Legal Issues Concerning Dual Jurisdiction -- Internal University Charges and Outside Criminal Proceedings Arising out of the Same Facts

A. Claims of double jeopardy.

> "Defendant's double jeopardy argument is that his prosecution was barred because Rutgers charged him in a university administrative proceeding with substantially the same conduct as that which is the basis for his criminal convictions. Even if we were to consider a Rutgers disciplinary proceeding the equivalent of a proceeding before a State administrative agency, the criminal prosecution would not be barred." See Adkins v. Parsekian, 37 N.J. 143, 154 (1962) (criminal and administrative sanctions may be imposed for the same conduct). State of N.J. v. Callaghan, Superior Ct., N.J. Appell. Div. A-5999-89T2 (decided on March 26, 1992 -- unpublished opinion, p.7).

B. Attempts to enjoin disciplinary hearing due to pendency of criminal action as violation of accused student's privilege against self-incrimination.

As long as the accused student has the right to refuse to testify in the disciplinary proceeding, courts have refused to enjoin the internal proceedings on Fifth Amendment grounds despite the pendency of criminal charges arising out of the same incident. See, *e.g.*, DeVita v. Sills, 422 F2d 1172 (3rd Cir. 1970) (involving attorney's disbarment proceedings going forward prior to completion of criminal prosecution on same alleged misconduct); Peiffer v. Lebanon School District, 673 F.Supp 147 (M.D. Pa. 1987) aff'd 848 F2d 44 (3rd Cir. 1988) (involving refusal to enjoin internal dismissal proceedings against school employee for indecent assault charges against minor student while similar criminal charges were pending); and Kuhn v. Rutgers, et al., Superior Court of New Jersey, Chancery Division, Middlesex County (unpublished opinion dated June 27, 1984 of Judge Stephen Skillman, pp. 4-5).

> "I am also satisfied that while the prejudice to Rutgers from granting the requests sought [to enjoin the

> disciplinary proceeding] would not be extreme in nature, that a university does have an interest in terms of maintaining its own disciplinary structure with students in not unduly delaying disciplinary proceedings. The disciplinary action where warranted, is something that has an impact not only on the student directly involved but also upon other members of the student body and when a student is charged with an offense but time goes on, no action is taken it tends to dilute the overall effect of the university's efforts to maintain an appropriate disciplinary structure within the university."

C. Claim of violation of due process if student facing criminal charges cannot consult with lawyer of his choice during disciplinary proceedings arising out of same facts.

Because of the pending criminal case against a University of Rhode Island student charged with sexual assault, the denial to that student of having a lawyer of his own choice consult with him and advise him during the student disciplinary hearing without participating further in such hearing deprived that student of the due process of law. Hence, the First Circuit Court of Appeals upheld the lower court's enjoining of a disciplinary hearing under these circumstances. Gabrilowitz v. Newman, et al., 582 F2d 100 (1st Cir. 1978). (Note that this holding only applies to public institutions of higher education, which are subject to "due process" constitutional guarantees.)

III. Some Issues Involving Disciplinary Proceedings for Campus Disruptions

A. Alleged disrupters' attempts to make "show trials" of disciplinary hearings.

1. Are courts better equipped than campus internal proceedings to handle a large number of defendants?

2. Consolidation of disciplinary hearings for efficiency of time, convenience of witnesses yet more unruly, etc., versus the more controllable but drawn-out process of separate hearings for each individual disrupter.

3. The interest of the media and public in attending the disciplinary proceeding if the defendants have the right to have an "open" hearing.

4. Should the role of lawyer for the alleged disrupters be as a spokesperson, or adviser only? The written procedures or college rules, of course, control, but in reviewing disciplinary codes, college officials should remember there are advantages and disadvantages to both. For example, a lawyer representing many voices of the disrupters would be an advantage, but that same lawyer might try to turn the disciplinary proceedings into a highly "legalistic" criminal trial -- a distinct disadvantage.

(Note: These issues are of more concern to public institutions which must have "due process" hearings.)

B. Importance of evaluating different burden of proofs in disciplinary hearings versus criminal courts.

This issue, referred to earlier in this outline, is critical in regard to such evidentiary problems as precise identification of disrupters (*i.e.*, proof of who the actual participants were) and which disrupters did what -- the so-called differentiation of conduct issue.

C. Assessment of possible punishments.

Ironically, disrupters may fear the possible punishment derived from a disciplinary proceeding (*e.g.*, expulsion or suspension) more than a criminal trial which may only lead to a small fine. College administrators should take the differences in possible punishments into account in deciding which forum is the more appropriate for the disruptive behavior in question. Of course, the answer can be to proceed on both fronts -- disciplinary proceedings and in the courts.

VI. ADDITIONAL RESOURCES

ADDITIONAL RESOURCES

COURT DECISIONS

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